IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 733

PAUL DE LUCIA

vs.

WILBOR T. FLAGG

PETITION

For a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

WM. SCOTT STEWART
Chicago, Illinois
Counsel for Petitioner

Appended

Opinion of Court of Appeals, Opinion of District Judge and Opinions in related cases.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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PAUL DE LUCIA

v.

WILBOR T FLAGG

PETITION

For a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

I

The Opinions of the Courts Below

The opinion of the Court of Appeals has not yet been reported. It appears in this record and has been copied in the Appendix, hereinafter. The opinion of the Hearing Officer is in the Appendix printed for the court below (App. 1). Also the opinion of the Board of Immigration Appeals (App. 12). The opinion of Judge Perry (App. 26) and the brief sent to the Government on petition for review of the Administrative Agency appears also in the Appendix, hereinafter.

In related cases, the Naturalization Court, Judge Wilkerson rendered no opinion. The opinion of Judge LaBuy in the Denaturalization case is reported in *United States v. DeLucia*, 163 F. Supp. 36, affirmed 256 F. 2d 487, certiorari denied 358 U.S. 836. The opinion of the Court of Appeals in the contempt case is reported in 256 F. 2d 489. All three of these opinions have been here appended, pp. 801, 813, 823.

In the denial of the motion for leave to proceed in the District Court, herein pp. 865, 871, the Court of Appeals rendered no opinion.

II.

Jurisdiction.

The date of the judgment to be reviewed is December 4, 1961. Our Petition for Rehearing was denied January 11, 1962. Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A. sec. 1254). Based on the Title 28 U.S.C. 1940 ed. §§346 and 347 (Mar. 3, 1911, c. 231, §§239, 240, 36 Stat. 1157; Feb. 13, 1925, c. 229 §1, 43 Stat. 938; Jan. 31, 1928, c. 14§ 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926) from Revisor's Note Title 28 U.S.C.A. Judicature and Judicial Procedure §1254 p. 429.

Jurisdiction in the District Court was founded upon the Declaratory Judgment Act, 28 U.S.C. §2201 and the Administrative Procedure Act, 5 U.S.C.A. §1009, 60 Stat. 243.

The date of the denial by the Court of Appeals of leave to petition the District Court pursuant to Rule 60 (b) Federal Rules of Civil Procedure in *United States v. DeLucia*, No. 26674 1971 was January 11, 1962. Jurisdiction to issue the writ is to be found in 28 U.S.C.A. §1651 (a) known as the all writs section of the Judicial Code.

III.

Questions Presented.

6. If it be held that the savings clause was not intended by Congress to be applicable and the 1952 Act is intended to operate retroactively is such legislation a valid exercise of Congressional power despite the doctrine of res judicata?

7. What legal effect should be given by an Administrative Agency to a decree of denaturalization in considering issues previously determined in a naturalization proceeding?

8. Should the Government be estopped by proceedings had in a denaturalization case from again litigating in a deportation case, issues which might have been litigated but were not, in the denaturalization case?

9. As grounds for cancellation, Congress shifted from fraud and illegal procurement (§340(a)) to concealment of a material fact or wilful misrepresentation (8 U.S.C.A. §1451 (a)).

(a) Did the denaturalization court have jurisdiction to cancel on the ground of illegal entry?

(b) Did the denaturalization court in fact base its decree in any part on illegal entry?

(c) If not, did not the denaturalization decree leave standing the judgment of the naturalization court as to a legal entry?

(d) If in fact the complaint in the denaturalization case can be held to include a charge of illegal entry and the undisputed evidence before the denaturalization court showed a legal entry, can it not be said that the doctrine of estopped applies?

(e) If as a matter of law the denaturalization court had jurisdiction to cancel the finding made by the nat-

uralization court as to entry and did not so do, is not the Government estopped because of the opportunity afforded in the denaturalization court?

10. Can an administrative hearing be said to be fair where it appears that the Hearing Officer placed the burden on petitioner to show that his entry was lawful?

11. Can an administrative hearing be said to be fair where it appears from the record that the Hearing Officer was mistaken in holding that petitioner was not entitled to the protection of the Fifth Amendment and that Officer recorded the refusal to testify as a failure to meet a burden of proof wrongfully placed by that Officer on petitioner?

12. Can a hearing be said to be fair where it appears from the record that the Hearing Officer considered evidence introduced in the absence of petitioner?

13. Can a hearing be said to be fair where it appears that the Hearing Officer relied upon certain foreign documents without proper foundation without proof that petitioner was in fact the person named therein?

14. Can a hearing be said to be fair where it appears that the Hearing Officer has

(a) made conclusions of fact not proven and in contradiction of circumstances proven?

(b) improperly construed §291 of the McCarran Act, 8 U.S.C.A. 1361, so as to cast the burden on petitioner to prove legal entry and to penalize petitioner for claiming privilege and not testifying as to entry, after entry had been proven.

(c) took evidence in the absence of plaintiff.

(d) refused to accept the legal effect of prior decisions and judgment concerning matters again put in issue.

(e) refused to accept the nondeportable status of petitioner as preserved by the saving clause of the McCarran Act of 1952.

(f) made serious mistakes as to the law.

(g) failed to require the Government to prove the law of Italy as a fact in the case.

(h) failed to notice the effect which should have been given to the suppression of evidence in the possession of the Government.

(i) made an arbitrary decision as to the facts and the law involved.

(j) regarded petitioner as if he now stood at our gates seeking admission rather than a resident entitled to due process of law.

15. Is the provision in the statute about the exclusion of aliens having been convicted of a crime involving moral turpitude so vague as to be unconstitutional?

16. What is the legal effect to be given to the change in the denaturalization statute, 8 U.S.C.A. 1451(a)? Did the courts below err in holding that the Savings Clause in the McCarran Act preserved the jurisdiction under the previous statute in denaturalization cases instituted after 1952?

17. The Government has taken the following position based upon *Schneiderman v. United States*, 320 U.S. 118 and other cases decided under the old law:

> "Congressional bar makes inapplicable to these proceedings the doctrine of *res judicata*; nor are estoppel and laches applicable to the Government in these proceedings."

The question presented is what effect did the shift of ground explained in *United States v. Stromberg*, 327 U.S. 265, have on the above proposition?

18. Should the Court of Appeals have granted petitioner's motion for leave to file a petition in the District Court pursuant to Rule 60 (b) Federal Rules of Civil Procedure?

The Constitutional Provisions Involved.

Art. I, §9 of the Constitution providing that:

"No Bill of Attainder or ex post facto law shall be passed".

Fifth Amendment

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . .

Statutes Involved.

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

Section 241, (a), 66 Stat. 204, 8 U.S.C. (1952 Ed.) 1251 (a):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

The Savings Clause and other statutes are to be found in Appendix B, hereof, p. 852.

PETITION

To the Honorable Earl Warren, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

May it please the Court:

The petition of Paul DeLucia respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

This is a deportation case. After a hearing before the Administrative Agency petitioner was ordered to be deported on two grounds which we copy from the order to show cause (App. 84)*

5. You were not then in possession of an unexpired passport or official document in the nature of a passport showing your origin and identity;

6. You were convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide.

After the Board of Immigration Appeals dismissed the appeal (App. 129) petitioner presented his petition for review to the District Court (App. 3).

The jurisdiction of the District Court was not questioned. It was founded upon the Declaratory Judgment Act 28 U.S.C. §2201, *Brownell v. Tom We Shung*, 352 U.S. 180, and the Administrative Procedure Act, 5 U.S.C.A. §1009, 60 Stat. 243, *Shaughnessy v. Pedreiro* 349 U.S. 48.

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* Reference is here made to the Appendix printed for the Court of Appeals in No. 13365

Judge Perry granted a motion for summary judgment (App. 246). This judgment was affirmed by the Court of Appeals, herein p. 845.

Petitioner came to this country in 1920. The Immigration Act of 1917, 39 Stat. 874, 889, 8 U.S.C. (1934 Ed.) was then in effect. Deportation proceedings could have been brought against petitioner at any time within five years after his entry, on the grounds here alleged to have existed. No such proceedings were brought and petitioner became immune from deportation on said charges under the then existing law.

Petitioner passed inspection at the Port of New York and was allowed to enter as an immigrant for permanent residence. The quota law had not been enacted. It is contended that the determination by the Officials in 1920 that petitioner was then legally entitled to enter had the presumption of correctness. The Government assuming that this presumption was rebuttable, undertook to prove by circumstantial evidence that the passing of petitioner was due to a mistake on the part of the officials.

It is claimed in effect by the Government that this mistake was made because of misrepresentation made by petitioner. There is no evidence concerning what took place in the way of representations to the Inspector, true or false.

It is contended by petitioner that the Government had the burden of proof on this subject and that this burden was not met.

In view of the rule that the decisions of Immigration Officers in a deportation hearing on questions of fact are conclusive if supported by evidence, we inform Your Honors at the outset that there is not involved here

(a) credibility of witnesses.

(b) conflicts in evidence.

It is claimed however that the Government failed to prove its case. The Hearing Officer made inferences from circumstances in proof and then made further inferences based upon the first inferences. The Hearing Officer also made inferences which were contradicted by the undisputed facts in the record. This condition of the record requires close attention to the details of proof. We point out the total absence of evidence in vital areas.

The Administrative Agency erroneously construed Section 291 of the Immigration Act to cast the burden of proving a legal entry on petitioner (App. 103).

Petitioner contended that all Section 291 required was proof of the time, place and manner of entry. Such proof had been established before petitioner was called upon to testify, by uncontradicted exhibits in the record before the Hearing Officer.

After a residence in the United States for five years, in 1925, petitioner filed in the Circuit Court of Cook County his Declaration of Intention (App. 267). In this Declaration, petitioner under oath, furnished the facts required as to time, place and manner of entry. In 1928, petitioner executed a Preliminary Form for Petition for Naturalization (App. 206).

Stephen A. Durisch (App. 139), a Naturalization Examiner, testified that he did not remember petitioner, but he recognized his handwriting on what is called a Face Brief (App. 205). The witness told of the usual custom as to how applicants were put under oath and examined. Certain check marks were identified and explained. The Designated Examiner was identified as Mr. McKay, who had died before the trial. The markings on the Face Brief indicated that Mr. McKay had examined petitioner and his witnesses and had indicated his approval of the application for citizenship. Andrew Jordan, (App. 167) testified that he did not remember petitioner or the event, but from the

markings on the Face Brief he concluded that he had been in court representing the Immigration Service, as Designated Examiner, at the time that petitioner was granted citizenship. Both witnesses, Durisch and Jordan, gave testimony to show that it was customary for the Examiners to check over with an applicant the contents of his preliminary form and to prepare his petition for naturalization. Insofar as their evidence shows the matter involved in the case at bar, petitioner had truthfully answered all questions as to time, place and manner of entry.

The subject of a passport for petitioner was not mentioned by these witnesses, nor was any other question concerning entry discussed, further than that a check of the answers made by petitioner in the various papers corresponded with the records as to time, place and manner of entry.

The witnesses explained how the Certificate of Arrival was obtained for an applicant. Petitioner was not required to do anything more than to answer the questions about time, place and manner of entry.

The Certificate of Arrival was obtained by the local Examiners before the Declaration was filed. It was kept in the field headquarters for future use when required by the Examiners. (App. 174)

Section 4 of the Act of June 29, 1906, provided that it was the duty of the Bureau to keep books of record and to cause a Registry to be made in the case of each alien arriving in the United States showing the place of birth, the last residence, the intended place of residence, date of arrival and the name of the vessel. The contents of any such registration was not proved by the Government, either before Judge LaBuy or before the Hearing Officer.

The testimony of Durisch and Jordan was said to furnish part of the circumstantial evidence to show the falsity of

the following answer made by petitioner in 1928 in his Preliminary Form (App. 211).

24. Have you ever been arrested? No.

It was contended on behalf of petitioner before Judge LaBuy, partly because of previous questions about the United States, that the above question referred to arrests in the United States. Judge LaBuy regarded the question as if it required an answer about an arrest in Italy. The theory of the Government after the evidence was heard before Judge LaBuy was that a false answer to the above question No. 24 gave support to the following finding made by Judge LaBuy, herein, p. 812:

> "The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him".

Under this theory, it was not necessary to prove conviction. The theory was that any arrest whether there had been a conviction of a crime involving moral turpitude or not, whether of a felony or a misdemeanor, was a material fact of which the Naturalization Examiners were entitled to be advised. It is contended that materiality should be judged from the situation as it existed in 1928.

With the assistance and approval of the Immigration officials, petitioner filed his Petition for Naturalization (App. 212)* to which was attached a Certificate of Arrival in due form giving the time, place and manner of arrival.*

* The exhibits were before the Hearing Officer and the various courts. They have been certified to this Honorable Court. Photostat copies were printed for use below and appear in Vol. II of Appendix in No. 12903. Much of their contents have been printed in the Appendix for No. 13365.

All of the exhibits were admitted in evidence before the Hearing Officer by stipulation as shown (App. 88). Therefore we make no further reference to the page number at which any exhibit was offered in evidence.

After the Petition for Naturalization was approved, Judge Wilkerson entered an order of court admitting petitioner (App. 239), herein p. 863. This order was based upon the petition and affidavits in support, together with further testimony taken in open Court. The order included the following:

"By order of Court, name changed from Paul Maglio."

In 1957 Judge LaBuy entered a Decree of Denaturalization (App. 244) including the following:

"• • • the order • • • admitting the respondent Paul DeLucia also known as Felice DeLucia to citizenship, be and is hereby revoked, set aside and made void;

• • • the Certificate of Naturalization • • • be and the same is hereby cancelled;"

Judge LaBuy wrote an opinion, herein p. 861, reported in *United States v. DeLucia*, 163 F. Supp. 36; affirmed 256 F. 2nd 487, herein p. 813, certiorari denied 358 U.S. 836.* The following is quoted from the opinion of Judge LaBuy, p. 41 herein p. 811:

"Stephen Durisch and Andrew Jordan both long time employees of the Immigration and Naturalization service, who served on occasion as Designated Examiners, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition by Paul DeLucia was processed in the customary way, leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such

* The record made before Judge LaBuy was printed in full in No. 13993 for the Court of Appeals, printed copies were filed in this Honorable Court. Also the printed record, together with the briefs was borrowed by Hearing Counsel and the courts below. All have been certified here as exhibits. Pertinent parts were again printed for use in No. 13365.

failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office."

Before the Hearing Officer, the parties stipulated (App. 88) that if the witnesses who had appeared before Judge LaBuy were again called, they would testify as shown by the printed Appendix in No. 12963.* Counsel for petitioner requested, and was granted the right to make objections. (App. 94). The exhibits before Judge LaBuy were introduced before the Hearing Officer. These exhibits were certified to Judge Perry, then to the Court of Appeals and are before this Honorable Court.*

As the Government had made no effort before Judge LaBuy to prove an illegal entry there was introduced before the Hearing Officer by stipulation the testimony of Mr. Ferro, an Inspector (App. 90) familiar with the procedure in use by Inspectors. Mr. Beck, the Inspector who had admitted petitioner had died before the hearing. Mr. Ferro said that if an immigrant had arrived without a passport he would have been held for a Board of Special Inquiry. Petitioner was not so held, otherwise a notation to that effect would have been found on the Manifest. The Hearing Officer found (App. 121):

> "The evidence in the record has established that the respondent entered the United States in August 1920 by assuming the identity of Paolo Maglio and was not held for hearing before a Board of Special Inquiry. It is reasonable to conclude that at the time of his admission the respondent presented a passport in the name of Paolo Maglio and thereby gained entry into the United States. It has been established that the

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*Photostats of some of the exhibits appear in Appendix Vol. II of No. 12963. Also they appear in printed form in the Appendix of No. 13365. The order of the Court of Appeals directing the Clerk to transfer the exhibits and briefs of the parties is shown herein, p. 870.

respondent is not Paolo Maglio and that he is, in fact, Echee DeLucia. He, therefore, did not present a passport showing his true identity; he was not the person described therein; and the passport presented did not constitute a passport within the provisions of the Executive Order."

manifest and his passport. The ship doctor made an affidavit as to each manifest (App. 268, 272) and it can be inferred that the doctor checked the personal description of each immigrant as appears on the Manifest with the person described. A personal description of petitioner is to be found in Ex. 4 (App. 267), his Declaration of Intention and in Ex. 5 (App. 216) his Certificate of Naturalization. In concluding that petitioner assumed the identity of the witness, the Hearing Officer looked to circumstances to support that conclusion and ignored circumstances to make such conclusions impossible of support. To name a few, the witness was described as being 5'3" high, weighed 115 pounds, color of hair black, color of eyes blue. Petitioner has been described in various exhibits, including a height of 5 feet 7 inches, weight 145 pounds, fair complexion, eyes of brown.

Judge Perry said (App. 260), herein p. 841:

> "One who presents a passport issued in the name of another is not presenting identification of himself."

It will be observed that before the Administrative Agency and in the courts below the identification of a holder of a passport was limited to the name used. Other points of identification were ignored, *e.g.*, facts to show that there were two different passports issued to two different persons. Ignored also is the fact that each of these persons had his own visa. The Visa issued by the American Consul to the witness appears on his passport (Ex. 14K, App. 273). It may be assumed that petitioner had a visa, otherwise he would have been denied admission.

Judge Perry said (App. 261), herein p. 841:

> "In misrepresenting, as he did, his true identity, he perpetrated a fraud on the government in obtaining his immigration visa."

There is no evidence as to what petitioner may have represented to the American Consul, true or false, although it is apparent that this evidence is in the hands of the Government.

Francis Rando testified (App. 154) that he was attorney adviser with the Department of State, that he knew the language and had previously resided in Italy, while special officer with the State Department, in foreign service. In 1956 he was ordered by his superior of the Passport Office to proceed to Italy, consult with American personnel and assist in obtaining certain documents which he brought back. The documents put in evidence did not include anything concerning a passport, a visa, an application for a visa, or any paper concerning the matter of entry concerning petitioner. It is contended that the Government suppressed documents and records which might have contradicted the theory of the prosecution.

Although witness Maglio had previously taken the stand before Judge LaBuy (App. 147) and had produced his passport (Ex. 14 K, App. 233), Mr. Rando was asked no questions as to what he may have learned concerning the issuance of the passport to petitioner or for the witness Maglio. Mr. Rando was asked no questions about the issuance of a visa for petitioner or for the witness Maglio. No attempt was made by the Government to account for the absence of any papers, records or other evidence upon this subject. This gap in the evidence was regarded as of no importance by the Government when before Judge LaBuy as the matter of entry was not being litigated. The Hearing Officer gave no heed to the gap due to a misapprehension as to which was the burden of proof. The Hearing Officer assumed that the burden was on petitioner to show lawful entry.

The manifest (App. 268) shows that petitioner boarded the ship in Bologne, France. The record does not show whether petitioner obtained his visa in France, Italy, or where.

It is contended by petitioner that this failure to produce evidence within the control of the Government gives rise to the presumption that if produced the evidence would operate against the Government and every intendment should be resolved in favor of petitioner. The Complaint in the denaturalization case was filed in 1956. Nowhere in any of this litigation did the Government undertake to prove that the American Consul and the Immigration Officials had no knowledge of the facts upon which the Complaint was based and no knowledge of the facts supposed to support the deportation order as to what took place when petitioner entered the United States. The evidence shows that the status of petitioner changed when he was given his visa, when he passed inspection, again when he filed his Declaration of Intention and five years had elapsed from the time of his entry, again when he filed his Petition for Naturalization and still again when he was found by Judge Wilkerson to have acquired a legal residence here, which had been maintained for over five years. It is contended by petitioner that the Government left a serious gap in its case when it failed to prove when knowledge came to the officials. It is contended that even if there had been misrepresentations and a new relation is effected subsequent to the disclosure the legal status of that relationship is the same as if the misrepresentation had never been made.

In preparation to try the denaturalization case, the United States Attorney took the deposition of petitioner (App. 264, App. 23 in case No. 12993). Petitioner claimed the privilege against self-incrimination. Judge LaBuy held

that petitioner was not entitled to the privilege and sentenced him for contempt. This conviction was reversed. *United States* v. *DeLucia*, 256 F. 2d 493. The Court of Appeals said, p. 495; herein p. 826:

> "(3) It is apparent from the record before us that DeLucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute DeLucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court."

Before the deportation case was heard, Mr. Freedman, the Examining Officer, caused petitioner to be served with a subpoena *duces tecum* (Ex. A 56; App. 277), commanding petitioner to produce his passport or other document presented when petitioner entered on August 20, 1929. At the hearing petitioner explained that he had searched and that he had moved several times and was unable to find these papers. (App. 27)

Mr. Freedman called petitioner as a witness. Petitioner refused to answer questions concerning his entry into the United States, claiming privilege guaranteed by the Fifth Amendment. Mr. Freedman and the Hearing Officer took the position that § 291 required petitioner to testify. Petitioner through his counsel took the position that § 291 required only proof of the time, place and manner of entry, which evidence was already before the Hearing Officer by stipulation. In an effort to show that petitioner had reasonable ground to fear prosecution and consequently a right

to the protection of the Fifth Amendment counsel for petitioner addressed the Hearing Officer as follows: (App. 101)

> "Mr. Stewart: Paul DeLucia is now defendant in a matter, where he was convicted of income tax evasion, and that case is pending in the Circuit Court of Appeals. The court recently rendered an opinion dismissing two of the counts and affirming the third; and it is his intention to proceed further, as the law permits him to, and he faces various prosecutions, and investigations concerning other matters and if he were to testify here he will be compelled to be a witness against himself and that could be used in other prosecutions. Now, in answer to the remark made by your Honor, in a case such as this, where it is charged that Paul DeLucia entered this country and that was an illegal act, there are many ramifications which haven't been shown to this court but they appear in the transcript. So, if your Honor will take into consideration that which is already in the exhibit, (the record made before Judge LaBuy) it will be seen that if Paul DeLucia answered these questions he would be acting as a witness against himself on possible charges of conspiracy and entering the country without right and getting others to assist him to do that, and that could be charged to be a continuing conspiracy . . . that is, as long as he stayed here he was carrying out the objective of that conspiracy, which consisted of many things illegal under federal laws. So, if your Honor will, before you finally rule on whether you will direct him to answer, if you will consult the transcript . . . and then, I might say to you that questions similar to this were asked of him in the denaturalization hearing, in a deposition, and he claimed the Fifth Amendment and Judge LaBuy ruled that he didn't have the right to claim the Fifth Amendment. One reason given was pretty much the same as expressed by your Honor . . . one expressed in the *Costello* case; but this is different than the *Costello* case. And then we carried on. After Judge LaBuy sentenced Paul DeLucia for contempt of

court we took that up to the Circuit Court of Appeals and the court said we were right — we were within our rights in refusing to answer. So, I believe your Honor should be influenced by the opinion in the Court of Appeals and not rule that Paul DeLucia is not within his rights when he claims the Fifth Amendment. And I could, of course, go further and point out more reasons but I think enough of them are now in the record. If that transcript be consulted and if the opinion of the Circuit Court of Appeals be consulted, it will be seen that Paul DeLucia is within his rights in refusing to answer. Could I suggest that you take that under advisement, along with the case?"

Special Inquiry Officer: "I, of course, have not seen the transcript or any of these fifty-one exhibits that were introduced in the cancellation and, accordingly, in view of the statements made by Mr. Stewart, I will reserve ruling on the claim of privilege under the Fifth Amendment at this time."

The Board of Immigration Appeals said (App. 131):

"The respondent stood mute in this proceeding as he did when before the United States District Court for the Northern District of Illinois. The respondent was advised of the provisions of Section 291 of the Immigration and Nationality Act (8 USC 1361)."

The position of the Government is shown by the following (App. 103):

"Mr. Freedman: However, I would like to make this statement, that the Immigration law requires that the burden is upon the Respondent to show the time, place and manner of his entry and, regardless of the fact that he refuses to answer those questions under the Fifth Amendment, an adverse inference can be drawn, and such inference can be drawn from his failure to testify to those matters upon which he has the burden of proof. Now, I am not implying that an inference will be drawn because he claimed the Fifth Amendment, but I do say an inference can be drawn

by reason of the fact that he has not testified to those matters which he has to establish by the preponderance of the evidence and which the law requires him to establish."

We again quote from the opinion of the Hearing Officer (App. 109):

"As a basis for declining to answer these questions, the respondent invoked the privilege against self-incrimination under the Fifth Amendment. The respondent was informed of the provisions of Section 291 of the Immigration and Nationality Act, which provides, in part, that in any deportation proceeding the burden of proof shall be upon the person under deportation to show the time, place and manner of his entry into the United States, and that if such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law. Counsel for the respondent was asked whether he wished to present any evidence in this matter and he stated that he would offer no additional evidence and that the evidence relating to the respondent's entry into the United States was already in the record."

Counsel for petitioner said the following (App. 104):

"Mr. Stewart: May I call your Honor's attention to the fact that that regulation just read doesn't state how that proof shall be made and it is our position that the proof of the entry has already been made and you will find it in those exhibits.

Hearing Officer: Well, I will consider the issue in examining the transcript and the exhibits in the record."

Judge Perry said (App. 252), herein p. 833:

"The Petitioner claimed privilege under the Fifth Amendment when asked by the Examining Officer under what name he had entered the United States—whether he denied that he entered under the name of Paolo Maglio what his name was at birth—whether he denied that his true and correct name was Felice

DeLucia whether he had a passport at the time of his entry at New York, New York, on August 12, 1920, a passport in the name of Felice DeLucia—whether he had at the time of his last entry, at New York, on August 12, 1920, a passport in the name of Paolo Maglio and whether it was not true that he entered the United States at the Port of New York on August 12, 1920, in the name that was assumed and not his true and correct name. No further questions were asked of him by the Examining Officer."

It is contended that by the above, Judge Perry upheld the Hearing Officer and approved of the view expressed by Mr. Freedman that the effect of Section 291 is to abrogate the Constitution, so long as the questions pertain to an alleged illegal entry.

In an effort to prove (App. 84):

6. You were convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide.

And without any proof that petitioner is the person named therein, the Government introduced Ex. 36 (App. 224) which includes the following:

"Whereas, Felice Delucia was found by the jury to be guilty of voluntary homicide with grave provocation and carrying a gun, under extenuating circumstances; Whereas it is deemed appropriate to set the penalty, under Articles 364 51 55 of the Penal Code, at imprisonment for 3 years, reduced by 1 6th by reason of the extenuating circumstances, for the homicide, and at 4 months attachment reduced by one-half (Art. 56) and then by 1 6 because of the extenuating circumstances, for the carrying of a gun, the remainder to be reduced by one third for concurrence of sentences, an addition of a pecuniary penalty of 145 lire."

There had been no proof of the law of Italy before the Hearing Officer. When the Hearing Officer had the case

under advisement, he had before him our brief in the denaturalization case now here as an exhibit. We quote p. 90:

> "Now if Your Honors will look at Ex. 36, p. 18 it will be seen that it purports to be a conviction of 'Voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.'
>
> We have no such crimes in this country. The Government did not see fit to put anyone on the stand to explain and prove the law of Italy. If we try to understand in the terms of our statute we know that our chapter on Homicide includes killings which are not criminal."

In order to meet this objection, the Hearing Officer attached an appendix to his opinion (App. 125). This evidence was taken in our absence without notice and without any opportunity to cross examine.

We quote from the opinion of the Board of Immigration Appeals (App. 130):

> "Exceptions have been taken to the finding of deportability. Counsel urges that the evidence is insufficient to support the order of deportation and that the special inquiry officer's conclusions are contrary to law. It is alleged that the special inquiry officer considered matters not introduced in evidence in the absence of proof."

That is all that was said about matters not in evidence. The Board did not rule expressly on this claim of error.

The position of the Government is as follows (Brief p. 29, here as part of the record):

> "Petitioner's objection seems to stem from the ancient supposition that foreign statutes must be proved as a fact. But this is merely a rule of evidence sometimes applied by the courts. See 9 WIGMORE EVIDENCE

(3rd Ed.) 558, *et seq.*, McCormick, Evidence, 698. This rule evolved when communication was difficult and sources of knowledge less accessible. Its validity under modern conditions has been doubted by leading scholars.' Id.""

We quote from Judge Perry (App. 263), herein p. 844:

> "This court does not agree with petitioner's contention that the Special Inquiry Officer took evidence in the absence of petitioner and without notice when he obtained and referred to a copy of the Italian statute."

That is all Judge Perry said on the point. Perhaps Judge Perry meant to say that the Appendix (App. 125) attached to the opinion by the Hearing Officer was not in fact evidence.

There is no proof that the evidence was the law of Italy or that it had any application to the issues presented to the Hearing Officer. The Hearing Officer regarded the Appendix as evidence and based his findings to a large extent on this evidence. There was no evidence in the record, including that taken in the absence of petitioner that the five codes are in fact copies of the Italian law, that they are complete, or that they apply to Ex. 36 (App. 224). No attempt was made to show where or when the Hearing Officer obtained his information. The Court of Appeals said herein p. 849:

> "Respondent contends that the Hearing Officer erred in referring to the Italian Code in his decision as to moral turpitude since no proof of the foreign law was made at the hearing. We do not reach this question because, in our view, it was only necessary for the Hearing Officer to consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion."

In this manner, the Court of Appeals has permitted the Government to prevail upon one ground in the Administra-

tive Agency tribunals and upon another and different ground in the Court of Appeals. It is contended that this new ground finds no support in the law or in the evidence.

In the United States, the term Homicide includes killings without moral turpitude. In the absence of any proof on the subject we assume that the law of Italy also provides for homicides that are not murder or manslaughter. The reasoning of the Hearing Officer seems to go like this—

(a) I find a definition of a crime in the statute.

(b) I believe that the definition is intended to cover crimes in which theft had been moral turpitude.

(c) I assume that the conviction shown in Exhibit 36 was for the crime I find in the definition.

Judge Perry said (App. 262), *supra* p. 843:

> "It is the view of this court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed, particularly in view of the findings made by Judge LaBuy in the denaturalization case."

It is contended that Judge Perry considered only a portion of petitioner's claim of *res judicata*. If the findings made by Judge LaBuy be studied, four points will appear:

(a) Judge LaBuy did not have jurisdiction to base his decree on illegal procurement.

(b) A decree based upon proof of an improperly obtained Certificate of Arrival, an illegal entry without a proper passport or a conviction in Italy, would be a decree based upon illegal procurement.

(c) Judge LaBuy did not in fact base his decree on any of the grounds mentioned above in (b).

(1) The matters above mentioned in (b) were not litigated before Judge LaBuy.

The Court of Appeals said in the case at bar, herein p. 851:

> "The government entered in the denaturalization proceeding [after respondent's certificate of citizenship had been surrendered] is one which the doctrine of res judicata does not apply."

It is contended that this finding constitutes an error of law. Judge LaBuy said (App. 256), herein p. 837:

> "In this case petitioner argues that although [the statute] provides two grounds for vacating a naturalization decree, i.e., (1) fraudulent procurement and (2) illegal procurement, the 1952 amendment of Section 340 (a) [8 U.S.C. (1958 Ed.) 1451(a)] omitted the ground of illegal procurement. As set forth in the 1952 Act the grounds are that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation. Subsection (e) of amended Section 340 [8 U.S.C. 1451(e)] provides: 'The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.'
>
> "This Court is of the view that illegal procurement as a ground for denaturalization was saved by Section 405(a) of the Immigration and Nationality Act of 1952. In this connection it should be observed that in the

opinion of the Court of Appeals in the denaturalization case (256 F. 2d 485), Judge Schnackenberg said, at page 491:

> "We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization *was allegedly and fraudulently procured*, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied by Judge Perry.)

Petitioner contends that if the above use of the words *illegally and fraudulently procured* was understood by Judge Perry as an enlargement of the base of the decree entered by Judge LaBuy, then Judge Perry overlooked the duty of a review court to not order initial findings of fact or to interject a theory not supported by the record. Petitioner contends that after the effective date of the McCarran Act, illegal procurement was not continued as a ground for denaturalization. The issue presented to Judge LaBuy was whether the following allegation was false (App. 211):

> "24. Have you ever been arrested? No."

Judge LaBuy concluded [illegible] that the [illegible] was false, although Judge LaBuy did not state [illegible] Buy [illegible] p. 81):

> "The court holds that the use by the defendant of a name other than his own, his failure to disclose his true identity and the concealment of other material facts which [illegible] certificate of citizenship granted to him."

The Court of Appeals in affirming Judge LaBuy said, herein p. 8):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts', it is apparent to us from the context of the

[illegible] that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

The "failure to reveal" here must refer to the time when petitioner was examined by Mr. Dupuch, eight years after entry. When petitioner was under examination by Mr. Dupuch in 1925 the "failure to reveal," if there had been a failure, could not very well have been about entry, because in 1925 petitioner had an immunity against deportation on the ground of illegal entry. It is contended that even if Congress had the right to take away that immunity in a retroactive way, it did not. Congress could not reach back and take away the material which was immaterial when the questions were asked.

[illegible] Appeals for leave to [illegible] Court pursuant to Rule [illegible] Writ Procedure, before p. [illegible]. The [illegible] p. 851. The grounds upon which [illegible] presented to the Court of Ap[illegible] before p. [illegible]. The Govern[illegible] opposition, before p. [illegible]. Since [illegible] Latin, Your Honors have [illegible] U. S. 213, making it [illegible] to turn the clock [illegible] should be judged [illegible] the time of the act of the de[illegible] regarded *Nardi v. United* [illegible] the Latin decree. It is our [illegible] should have an opportunity to [illegible] the light of these [illegible] cases.

B.

Summary of Argument.

Conflict in Construction of McCarran Act as to Status acquired by Petitioner.

There is a conflict between *United States ex rel. Zacharis v. Shaughnessy*, 221 F. 2d 578, decided in the Second Circuit and the case at bar decided in the Seventh District. The *Zacharis* case construed the McCarran Act, § 405(a), 8 U.S.C.A. § 1101 note, to give an alien a "status condition, or right in process of acquisition" as to which statutes repealed by the McCarran Act were continued in force by savings clause. In the case at bar, the Court of Appeals held that the savings clause did not apply, although petitioner had taken steps to become a citizen under prior law and long before the enactment of the McCarran Act.

Conflict as to Doctrine of Res Judicata.

In the Third Circuit in *Angelopoulos v. Hurdin*, 208 F. 2d 165, it was held that the doctrine of *res judicata* applied where the alien had previously secured a judgment fixing his status in a deportation proceeding. In the Seventh Circuit in the case at bar, the Court of Appeals has refused to apply such doctrine.

Conflict as to Jurisdiction in re Denaturalization.

In the case at bar in the Seventh Circuit, it has been held that Section 305 gives illegal procurement as a ground for denaturalization. In the Fifth Circuit, in *United States v. Stromberg*, 217 F. 2d 903, 907, we find an opposite holding. In *United States v. Zellner*, 250 F. 2d 487, the Court of Appeals interpreted illegal procurement as a ground for denaturalization and Judge Perry accepted such interpretation as the law of the case.

It is important that the law be settled by Your Honors. If the law is to be held as correctly stated in the Fifth Circuit in *Strombeck* and the Court of Appeals, in the Seventh Circuit is wrong, a prejudicial error has been committed. If illegal procurement was not continued by Congress, Judge LaBuy had no jurisdiction to decide the questions thought by Judge Perry to have been decided. Also the interjection of illegal procurement by the Court of Appeals was an interjection on a matter beyond the jurisdiction of Judge LaBuy. *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529, and *Perez v. United States*, 313 U. S. 1, 8, 9, should have reminded the courts below that finality and theories should not enter any case for the first time on appeal. Judge Perry in quoting the portion quoted by the Court of Appeals erred in not applying the rule stated in 50 C.J.S. Judgments § 603, 624, pp. 36, 50:**

> "A judgment or decree appealed on appeal is final and res judicata if it provided the judgment is of such nature that it would have been final and res judicata in the absence of an appeal."

If Judge Perry had followed the law as stated in the Fifth Circuit in *Strombeck* and had considered the opinion and findings made by Judge LaBuy without following the rejected theories, Judge Perry might then have decided [illegible]. When it comes time in the case at bar to consider whether or not the LaBuy decree resulted in cancellation to date back to 1955, or to be effective only from 1957, the presence or absence of jurisdiction may make a difference.

** The quoted [illegible]

Conflict as to Passport Act.

In the Seventh Circuit in the case at bar it was held that the Passport Act extended the power to deport. We quote from *United States* v. *Corsi*, 57 F. 2d 868, affirmed 61 F. 2nd 1043, in order to show a conflict with the Second and Eighth Circuits.

We submit that if the status of aliens who entered the United States in 1920 is to be reexamined today by virtue of the McCarran Act as if the aliens were at our gates, it becomes important that the law be settled on this conflict by this Honorable Court.

Conflict with a Decision of a District Court in Another Circuit.

In *United States* v. *Muff*, 2nd Circuit, 170 F. Supp. 182, Judge Dimock has held that the burden of showing the entry to be unlawful rests upon the deporting power. This conflicts with *Ulisidis* v. *Holland*, 3rd Circuit, 245 F. 2d 812. The Hearing Officer in the case at bar took the same view as expressed by Judge Hastie in *Ulisidis*.

Reasons for Asserting that Lehmann v. Carson, 353 U.S. 685 does not Control Here.

Two grounds were involved in *Carson*:

(a) Entry without inspection

(b) Conviction after entry

In *Barber* v. *Hoda*, 254 F. 2d 382, an alien who entered before July 1, 1924 without inspection was held to have been deportable. Judge Mathews said that the *Carson* case was not distinguishable. In a footnote Judge Mathews said:

> "As to whether appellee had any such status (non deportability) prior to December 24, 1952 we express no opinion."

We submit that in *Carson*, Your Honors did not directly express an opinion on ground (a) above. In the case at bar there are no such grounds as (a) and (b).

We quote from the brief filed on behalf of Carson in order to remind Your Honors that this Honorable Court did not deem it necessary to resolve much of the dispute between Carson and the Government. We point to differences between the issues in *Carson* and those submitted here by petitioner. In *Anselmo* v. *Hardin*, 253 F. 2d 165, Judge Kalodner said that the *Carson* and *Catalanotte* cases were inapposite, p. 172:

> "In the latter two cases there had not been a judgment prior to the deportation proceedings determining the non deportable status of the alien sought to be deported as there was in the instant case."

In the case at bar there had been a judgment about thirty years prior to the deportation proceedings, establishing that petitioner had entered legally and had become a resident. Judge Kalodner said p. 171:

> "It's (the Government's) contention that Section 241 (d) of the 1952 Act 'expressly excepts the charge of deportability for entry without inspection from the application of the 'savings clauses' in Section 405(a)' is tantamount to an assertion in the instant case that the 1952 Act has made inapplicable to deportation proceedings the doctrine of *res judicata*. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government."

So it appears that in *Carson* probably Your Honors did not choose to discuss the questions now submitted for the following reasons among others.

(a) The case at bar presents facts not present in *Carson*.

(b) If the McCarran Act is to be construed to make an alien deportable because of an illegal entry over forty years ago and about thirty years after a judgment establishing legal entry and residence, the McCarran Act is unconstitutional.

We quote from *Shomberg v. United States*, 348 U.S. 540, 546, on the meaning of the Savings Clause. The Certificate of Naturalization was taken from petitioner for something he had done, or failed to do, in his dealings with Naturalization Officials in 1928. The cancellation did not change the status he had acquired previous to the date of the execution of his Preliminary Form (App. 206). *United States v. Minnahe*, 348 U.S. 528, 535.

In the Sixth Circuit, in *United States v. Kershner*, 228 F. 2d 142, 146, it was decided that a status of nondeportability is protected by Section 405 of the McCarran Act. In the Seventh Circuit, in the case at bar, it was decided that petitioner can not avail himself of the protection contained in Section 405. We argue that it was error for the Court below to conclude that *Lehman v. Carson*, 353 U.S. 685 reversed *Kershner*, insofar as the question involved in the case at bar is concerned.

Petitioner having entered prior to July 1, 1924 cannot be deported for illegal entry.

In *Bonnadsen v. Nelson*, 2 F. 2nd 296, 298; *United States v. Smith*, 36 F. 2nd 563, with the approval of the Court of Appeals, 46 F. 2d 229, 230 and *Engel v. Zurbrick*, 51 F. 2nd 632, 633, it was held that the Passport Act affords no warrant or authority for deportation. Also see *United States v. Lehmann*, 136 F. Supp. 458. This case was reversed in *Lehmann v. United States*, 248 F. 2nd 519 on

authority of *Lehmann v. United States ex rel. Carson*, 353 U.S. 685. It is our contention that Your Honors did not expressly overrule Judge McNamee on the proposition quoted below. In the case at bar the Administrative Agency held otherwise and the court below, in effect, has held that the Passport Act is authority for deportation.

We quote from *United States v. Lehmann*, 136 F. Supp. 458, 461.

> "It would seem, therefore, that Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the United States prior to July 1, 1924 to apply for a status of permanent residence in this country. Kansas, in his work entitled 'Immigration and Nationality Act Annotated' has this to say of the effect of former Section 728 (b) and Section 1259 of Title 8 U.S.C.A.
>
> > 'However, if he (the alien) entered prior to July 1, 1924 and has not departed since, he cannot be deported for illegal entry alone. (Act of March 2, 1929, as amended August 7, 1939.) Carried over into the Act of 1952.' p. 123.
>
> See also Commentary on Immigration and Nationality Act of 1952 by Walter M. Besterman, pp. 65, 66, Vol. 1, Title 8 U.S.C.A."

If it is now to be held that *Lehmann v. Carson*, 353 U.S. 685, is authority for deportation of an alien who entered prior to July 1, 1924, without inspection, we point to the fact of inspection in the case at bar and the subsequent acquisition of lawful residence, in order to distinguish *Carson*.

Ex Post Facto.

We quote from *Lehmann v. United States*, 353 U.S. 685, the concurring opinion by Mr. Justice Black and we refer to the dissent by Mr. Justice Douglas in *Marcello v. Bonds*,

349 U.S. 302, 319. We respectfully request reconsideration of previous opinions on the subject of retrospective legislation as applied to deportation.

The Savings Clause in the McCarran Act Requires Application of the 1917 Immigration Act to Petitioner and preserves his Status thereunder.

We set out some of the history of the Savings Clause in an Appendix, herein p. 871.

By the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) Congress expressly limited deportation of illegal entrants to a period within five years after entry. In the same manner, Congress relieved from deportation those aliens convicted of crime, who had been pardoned. The savings clause, which expressly preserved any existing status or condition and which expressly continued in effect as to such status or condition the Act of 1917, represents a reaffirmation by Congress of its policy "not to strip alien of advantages gained under prior laws." *United States* v. *Menasche*, 348 U.S. 528, 535.

It is our view that section 241 (8 U.S.C. 1251) of the 1952 Immigration and Nationality Act did not otherwise specifically provide for the deportation of those protected by the savings clause.

We submit that through the retroactive deportation provisions of the 1952 Act, aliens deportable under prior laws whose presence here was not detected on December 24, 1952, continued to be deportable despite the repeal of those laws. On the other hand, those who acquired a non-deportable status under the prior laws had such status preserved. In this way an effect will be given to all parts of the statutes.

Petitioner is not subject to deportation if his status of nondeportability was preserved under section 405(a), the 1952 Immigration and Nationality Act Savings Clause (8 U.S.C. 1101 Notes). He was not subject to deportation under legislation which was in effect prior to the 1952 Immigration and Nationality Act. In effect, the Administrative Agency, affirmed by the Courts below, has held that petitioner did not have a status under prior legislation which could be preserved by the McCarran Act. We contend that the term status in the 1952 Act savings clause encompasses and preserves petitioners nondeportability under prior legislation. In addition, the savings clause speaks of "conditions" and "rights in process of acquisition." The question is whether § 241 (d) by specific provisions prevents the continuation of the old law, preserved by the savings clause. We contend that Congress in enacting the Savings Clause did not intend to preserve only rights "in process of acquisition" and cut off rights fully acquired. *Wong Kan Sang v. Brownell*, 227 F. 2d 41.

The Orders and Judgment entered by Judge Wilkerson in 1928 are res judicata on the very issues relitigated before the Administrative Tribunals.

We tabulate the various facts shown as to petitioner, including steps taken by him to acquire citizenship. When it became a matter for the Hearing Officer to appraise the decree entered by Judge LaBuy the Hearing Officer was misguided. The Hearing Officer failed to observe that when the LaBuy decree was affirmed, the Court of Appeals interjected matter beyond its power. This interjected matter was also followed by Judge Perry. Judge Perry erroneously enlarged the jurisdiction of Judge LaBuy by holding that a former law as to jurisdiction was kept in

force by the McCarran Act. The Court of Appeals erroneously held that the LaBuy decree made null and void all that took place before Judge Wilkerson.

We quote from *Anselmo v. Hurdip*, 256 F. 2d 171, to show that the doctrine of *res judicata* is not within the control of Congress. *Lehmann v. United States*, 353 U.S. 685, is not in point because, for one thing, the alien had not obtained a judgment fixing his status.

The Court of Appeals, in the case at bar, erred in holding that the cancellation of petitioner's Certificate of Naturalization nullified anybasis for the doctrine of *res judicata*. The Court of Appeals we respectfully submit did not fully understand our contention. The Court of Appeals misses the point that Judge Wilkerson, by judgment established a status for petitioner as a resident alien who had entered legally. Judge Wilkerson exercised judicial power as conferred by the Constitution, Article III. When the Court of Appeals affirmed the denaturalization decree, 256 F. 2d 487, 491, herein p. 8[illegible], it decided that the judgment and orders entered before Judge Wilkerson were not *res judicata* of the issues presented before Judge LaBuy. Judge Petty and the Appeals Court failed to properly understand the issues decided by Judge LaBuy. Our contention is that the Wilkerson judgment precludes relitigation of the matter of entry before the Hearing Officer. We set out part of the Complaint, App. [illegible], before Judge LaBuy to show that it was charged that petitioner did not present a Certificate of Arrival. This charge was shown to be false by the Government evidence before Judge LaBuy and was there abandoned. The Complaint contains some sketchy conclusions about an assumption of a false identity at the time of arrival, but Judge LaBuy made no findings concerning entry. What little

evidence there is in the record made before the Hearing officer through the Writer. Here was one intended to show illegal entry, appeared for the first time before the Hearing officer. Judge Lathy did not undertake to vacate or modify the various papers upon which Judge Wilkerson entered judgment. If Judge Lathy had undertaken to cancel the Certificate of Naturalization on the ground alleged in the Complaint about illegal entry, that would have been illegal, entirely, not in the Complaint and not in the statute.

After Your Honors consider the appeals the legal effect of the judgment by Judge Lathy, the authorities and arguments as follows:

void the previous judgment. Until set aside, a voidable judgment is not subject to collateral attack. 49 C.J.S. Judgments, §449 p. 880.

The Court of Appeals construed the opinion of Judge LaBuy to mean p. 499, herein p. 818:

> "DeLucia's failure to reveal his convictions for homicides in Italy • • • •"

It would have been more accurate if the Court of Appeals had said

DeLucia's failure to reveal his arrest in Italy.

Judge LaBuy was interested in the record of convictions only to the extent that they showed an arrest. This failure to reveal took place eight years after entry. The determination of issues actually litigated is conclusive. *Cities Service Co. v. Securities and Exchange Comm.*, 257 F. 2d 926, 930. Now Your Honors are respectfully requested to determine if the precise fact determined had anything to do with entry.

We repeat the above quote from the Court of Appeals p. 499, herein p. 818:

> "DeLucia's failure to reveal his convictions for homicides in Italy • • • •"

A re-examination of the records, including the opinion by Judge LaBuy, must compel Your Honors now to perceive that the "failure to reveal" must mean failure to reveal to the Naturalization Examiners. When Judge LaBuy and the Court of Appeals used the plural, "homicides", they included a conviction in 1924, entered in the absence of the defendant therein named (Ex. 38, App. 229). There is no evidence that petitioner even knew of the conviction when he was naturalized.

Judge Boray in answer to our point said (App. 206):

"... he perpetrated a fraud on the government in obtaining his immigration visa."

There is no evidence to support such conclusion. The "failure to reveal" can not legally be extended from failure to reveal to Examiners to "failure to reveal" to the American Consul and the inspectors at the port of entry.

The concealment or misrepresentation occurred three years after petitioner had acquired legal residence. All the investigation possible to be made after the alleged false answer was made on the Preliminary Form (App. 206) in 1928 and before the Petition for Naturalization came on for hearing (App. 212) could not have developed any fact to show that petitioner had not acquired, not only a legal residence, but a status of non-deportability. Even if an investigation developed all of the circumstances recited before the Hearing Officer and it could have been presented to Judge Wilkerson in 1928 by the Government in opposition to petitioner's application for citizenship, Judge Wilkerson may have found that petitioner had acquired residence in the United States. Judge Wilkerson may also have found, after consideration of all of the evidence now before the Administrative Agency, that petitioner was of good character and entitled to be admitted to citizenship. Petitioner must be judged by the law as it existed in 1928, not as it is today under the McCarran Act. *To what a material as in 1928 (cf. Jordan v. Tashiro*, 278 U. S. 123, 127). In 1928, a false answer as to an arrest was not material on his petition (and it was). Nor was a false answer in 1928 as to an arrest (or finally material after petitioner had acquired lawful residence and a status of non-deportability. Even if Congress had the power to take away the status petitioner (cf. Congress could not turn back the clock and make an answer material in 1952 which

was not material in 1928. It is true that the Act of 1952 changes the law, but such change does not alter fundamental principles of law. *Anselmo v. Hardin*, 253 F. 2d 165, 171.

We quote from *Anselmo v. Hardin*, 253 F. 2d 165, 168 to point up well settled principles applicable to res judicata. In a footnote Judge Kalodner quotes Mr. Justice Frankfurter in *Angel v. Bullington*, 330 U.S. 183, as follows:

> "The doctrine of res judicata reflects the refusal of law to tolerate a needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion . . . And it has gone through, *if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties*." (Emphasis supplied by Judge Kalodner).

The Court of Appeals, below, p. 819, said that the proceedings before Judge Wilkerson were not res judicata of issues presented in the denaturalization proceeding.

This brings into focus two questions:

(1) What were the issues [illegible] Judge Wilkerson?

(2) What were the issues presented [illegible]

(a) If (1) and (2) were the same, [illegible]

(b) If (1) and (2) were not identical [illegible] and (2) but not (1), and we need not decide with (2).

Before the Hearing Officer, a new problem arose. Did the doctrine of res judicata apply in consideration of the judgment entered by Judge Wilkerson as to the issues in the deportation case?

(1) What were the issues before Judge Wilkerson?

(2) What were the issues before the Hearing Officer?

(3) What was the jurisdiction granted by law to Judge Wilkerson on the matter of entry?

(4) What was the jurisdiction granted by law to Judge Lalley on the matter of entry?

(5) What was the jurisdiction granted by law to the Hearing Officer on the matter of entry?

There was no evidence upon which Judge Perry might conclude that petitioner made any material misrepresentations to the Inspector when he entered the United States. What is more important, there has been no showing anywhere that Judge Wilkerson was told or not told of any misrepresentations made by petitioner concerning entry. Our point is that the Government had an opportunity to contest the veracity of the Certificate and the records of entry, before Judge Wilkerson. Having failed to do so, it is now too late. *United States* v. *Nechman*, 183 Fed. 788; *In Re Jow Gin*, 175 F. 2d 299; *Anselmo* v. *Hardin*, 253 F. 2d 165.

Assuming for the purpose of argument that Judge LaBuy had jurisdiction to cancel the finding of Judge Wilkerson, *i.e.*, that petitioner had entered lawfully; that Judge LaBuy could have cancelled the Certificate of Arrival and could have ordered the record upon which this Certificate was based, to be expunged, Judge LaBuy did none of these things. The original judgment entered by Judge Wilkerson is left standing. There was no evidence before Judge LaBuy concerning the entry, further than that shown by the exhibits.

Before the Hearing Officer, the Government established for the first time in all of this litigation the death of Mr. Beck, the Inspector who evidently passed petitioner. The witness, Edward Ferro (App. 90) was not produced before Judge LaBuy, nor was any other witness called before Judge LaBuy to prove anything about entry. The exhibits put in evidence before Judge LaBuy and again before the Hearing Officer show a legal entry, which evidence was uncontradicted.

We call attention to the judgment entered by Judge Wilkerson and Certificate of Naturalization as a starting point from which to review the order of deportation. We respect-

fully represent that under the Law, the judgment of naturalization constitutes a final determination of issues of fact, the establishment of which Congress made conditions precedent to naturalization. *Choctaw County Dist. v. Bank*, 308 U.S. 371, 378; *United States v. Throckmorton*, 98 U.S. 61; *United States v. Richmond*, 17 F. 2nd 28.

Mr. Justice Douglas in *Kramer v. United States*, 328 U.S. 654, 670, distinguished *United States v. Throckmorton*, 98 U.S. 61 and *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421, from which the following appears:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact the establishment of naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category."

Your Honors do not have a communist case. There has been no suggestion to date that petitioner did not take the oath of allegiance in good faith. It becomes necessary to consider the extent to which the original proceedings in the Naturalization Court may constitute a final determination of issues of fact. Those facts relating to the past, to behavior and conduct.

The Courts below have ignored the fact that petitioner must have established lawful entry as an immigrant with intent to remain and that Judge Wilkerson found that he had acquired that status in 1928.

We quote from *Tutun v. United States*, 270 U.S. 568, 578:

> "The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court."

In *Re Vasicek*, 271 F. 2d 326, as illustrating the rule that the burden rests on a petitioner for naturalization affirmatively to establish that he had fully met the requirements of the statute, Judge Dwyer has gathered the authorities relating to the various steps including:

> "* * * proper proof has been made concerning his entry in the United States. * * *"

We quote from *Petition of Largo*, 21 F. 2nd 968:

> "Under the law, it seems apparent that a declaration of intention can be made legally by an alien only when he is legally a resident of the United States."

Judge Wilkerson approved of and accepted the Declaration of Intention and the petition for naturalization, and admitted petitioner to citizenship. When the Hearing Officer decided that petitioner had entered illegally, that official failed to give the required legal effect to the judgment entered by Judge Wilkerson. It appears that Judge Perry (App. 262) was under the mistaken opinion that Judge LaBuy had found the entry to have been illegal. We submit that if Judge LaBuy had cancelled because of illegal entry that would have been for illegal procurement. Judge LaBuy had no jurisdiction to cancel for illegal procurement. *United States v. Strombra*, 227 F. 2d 903. Even if Judge LaBuy did have jurisdiction of a charge of illegal procurement, no such charge is in the Complaint (App. 133).

To sum up:

(a) This deportation case and the previous denaturalization case before Judge LaBuy are two different suits between the same parties.

(b) An inquiry must be made as to whether the allegation of unlawful entry, made before Judge LaBuy was actually litigated and determined, but what might have been litigated and determined.

(c) Only upon matters actually litigated and determined is the judgment before Judge LaBuy to be regarded as an estopped as against petitioner.

We quote from *Larson* v. *Northland Trans. Co.*, 292 U.S. 20, 25:

> "The established rule in this Court is that in a second action between the same parties, a claim different from one sued upon in a prior action is presented, then the judgment in the former case is an estoppel 'only as to those matters in issue or points controverted upon which the finding or verdict was rendered.'"

The judgment entered by Judge Wilkerson might be regarded as a voidable judgment. By authority of Congress, Judge LaBuy was granted a limited jurisdiction to void a previous judgment. Until set aside, a voidable judgment is not subject to collateral attack. 49 C.J.S. JUDGMENTS §449 p. 880. We quote from *Brisco* v. *Bd. of Columbia*, 221 U.S. 547, 553:

> "There is no possible ground for upholding the present collateral attack if the order was voidable only."

We quote from *Schneiderman* v. *United States*, 320 U.S. 118, 160:

> "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently, we think the Government should be limited as in a criminal proceeding, to the matters charged in its complaint.

What was involved before Judge LaBuy and there determined is to be tested by an examination of the record, including the pleadings, the evidence submitted and the respective contentions of the parties. *Otis Savage Co.* v. *Securities and Exchange Comm.*, 257 F. 2d 926, 930.

Judgments must be interpreted in the light of pleadings. *Caprato v. United States*, 217 F. 2d 783. The Government, before Judge LaBuy, could not recover upon a cause of action different than that upon which the complaint was based. *Rosenfeld v. Linn Manufacturing Corp.*, 253 F. 2d 90.

Even if we assume for the purpose of argument that the LaBuy decree could have been regarded as an estoppel before the Hearing Officer on the matter of entry the Government waived that estoppel by reopening the question before the Hearing Officer.

In its brief to the Court of Appeals on our appeal from Judge LaBuy, the Government included the following p. 3:

> "Congressional bar makes inapplicable to these proceedings the doctrine of res judicata, nor are estoppel and laches applicable to the Government in these proceedings."

Authorities were cited including *Johannessen v. United States*, 225 U.S. 227; *Manci v. United States*, 274 U.S. 45; *Luria v. United States*, 231 U.S. 9; *United States v. Ness*, 245 U.S. 319; *United States v. Ginsberg*, 243 U.S. 472; *United States v. Steed*, 2 Cir. 1945, 152 F. 2d 614, cert. den. 328 U.S. 868; *United States v. Hauck*, 2 Cir. 1946, 155 F. 2d 141; *Knauer v. United States*, 328 U.S. 654, 673; all decided before Congress changed the law as to denaturalization as appears in *United States v. Stromberg*, 227 F. 2d 903. We respectfully ask that Your Honors reconsider the authority of *Johannessen et al.* in the light of the new statute. The Government asserted that the new statute had the effect of further restricting the doctrine of res judicata. We quote p. 8:

> "Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. See,

e.g., *Hazel-Atlas Glass Co. v. United States*, 238 U.S. 9. Without distinction between intrinsic or extrinsic fraud, have the courts held this to be so."

As we understand the previous decisions *Johannessen* et al, the claim made by the defendants that the Naturalization judgment stood as a bar to Denaturalization, Your Honors rejected this claim on the ground that Naturalization had been illegally procured. Now that Congress has repealed illegal procurement as a ground, we contend that Congress has closed the gates sufficiently to put back the bar as far as the case at bar is concerned.

The Hearing Officer unlawfully placed the Burden on petitioner.

The Hearing Officer erroneously construed Section 291 as shifting the burden to petitioner to show lawful entry. The Board of Appeals approved of this erroneous construction and added that petitioner had stood mute at his peril. The Court of Appeals said, contrary to the record, that the Hearing Officer had placed the burden on the Government. All Section 291 requires is that an alien prove the time, place and manner of entry. *United States v. Murff*, 170 F. Supp. 182. Such facts were established by the exhibits in the record before petitioner was called upon to testify.

The Court of Appeals does not mention the *Murff case* or the fact that the statute has been changed. No mention is made of the fact that the Hearing Officer proceeded as if the old law were still in effect. It is contended here that the Hearing Officer made a mistake in the construction of Section 291 and consequently placed the burden on petitioner to make further proof of a lawful entry. As was said by Mr. Justice Frankfurter, concurring in *Harisiades v. Shaughnessy*, 342 U.S. 580, 597:

"Courts do enforce the requirements imposed by Congress upon officials in administrating immigration laws, e.g., *Kwock Jan Fat* v. *White*, 253 U.S. 454, and the requirement of Due Process may entail certain procedural observances. E.G. *Ng Fung Ho* v. *White*, 259 U.S. 276."

In the case at bar, the stipulated evidence demonstrated the time, place and manner of the entry in 1920 into the United States by petitioner. The burden of showing that such entry was unlawful rested upon the deporting power. From the record it appears that the Hearing Officer made a serious mistake as to the law applicable.

The Administrative Agency Acted on the Assumption that Section §291 of the McCarran Act Took from an Alien the Privilege against Self incrimination.

The Hearing Officer in his opinion said that he did not agree that petitioner had a right to the privilege but that he did not use any inference from the claim of privilege. The Hearing Officer used a presumption, erroneously based on Section 291, that failure to testify caused him to conclude that petitioner was in the United States illegally. The Immigration Officials believed that the Fifth Amendment was qualified by Section 291. The Court of Appeals has accepted the statement of the Hearing Officer *ex.*, that he drew no inference because of the claim of privilege and points to Section 291 as creating a burden. The Board of Appeals construed the Fifth Amendment in the light of Section 291 and did not disclaim any inference. The Court of Appeals had previously held in *United States* v. *DeLucia*, 256 F. 2d 489, herein p. 823 that petitioner was entitled to the privilege. It must be that the Hearing Officer believed that Section 291 gave him authority to rule contrary to the Court of Appeals.

We quote from *United States* v. *DeLucia*, 256 F. 2d 493, 495 herein p. 826, which opinion was before the Administrative Agency.

> "To us it appears clear that he was entitled to rely upon the privilege which he claimed."

In addition to the information before the Court of Appeals at the time of its decision in the above contempt case, the Hearing Officer was informed as follows: (App. 101)

> "Mr. Stewart: * * * it will be seen that if Paul DeLucia answered these questions he would be acting as a witness against himself on possible charges of conspiracy and entering the country without right and getting others to assist him to do that, and that could be charged to be a continuing conspiracy that is, as long as he stayed here he was carrying out the objective of that conspiracy, which consisted of many things illegal under the federal laws."

Surely the Hearing Officer did not intend to overrule the Court of Appeals on the law of the case. The record, we submit demonstrates that the Hearing Officer believed that the fact that this is a deportation case made a great difference, that the McCarran Act gave him the right to treat petitioner as if he were an alien at our gates seeking admission. It must be that the Hearing Officer believed that § 291 gave him authority to rule contrary to the Court of Appeals. In the case at bar, the Court of Appeals makes no mention of *United States* v. *DeLucia*, 256 F. 2d 493, herein p. 823. Apparently the Court of Appeals has approved of the position taken by the Hearing Officer. We quote from *United States* v. *Roberson*, 235 F. 2d 517 on the rule that the Government must make out a prima facie case before shifting the burden to a defendant. This rule makes it unnecessary to discuss the effect of a possible presumption in a proper case. Petitioner was entitled to submit

his case to the Hearing Officer solely on the weakness of the Government's evidence. The Hearing Officer construed Section 291 in such manner as to require petitioner to either testify or suffer the penalty of a presumption that petitioner was an alien in the United States in violation of law.

The Administrative Tribunal failed to distinguish between a passport issued to petitioner and one issued to another and used by petitioner.

Certain datum points must be accepted as proved

(1) Petitioner had a passport,

(2) Petitioner had a visa.

The Government served a *subpoena duces tecum* on petitioner demanding the production of his passport and visa. When questioned at the hearing, petitioner swore that he had lost these documents. This opened the door to secondary evidence, but the Government elected to suppress its evidence. The Hearing Officer found, contrary to many circumstances in proof, that petitioner was not the person described in his passport.

Please note the difference between the witness and the petitioner.

Under this heading we go into detail in order to show from the record that it would have been impossible for petitioner to assume the identity of the witness.

We are able to demonstrate from the exhibits that petitioner in fact was described in his passport and that the witness Maglio was differently described in his passport.

We request attention to *United States ex rel. Fink* v. *Reimer*, 96 F. 2d 217 where Judge Hand explained the difference between the use of a passport belonging to another and a passport in fact issued to the immigrant under a name other than his own. Aliens who have passed through our

gates may be expelled only after proceedings conforming to due process of law. *Shaughnessy* v. *United States*, 345 U.S. 206, 212. The Inspector was not obliged to accept statements made by an alien as true. *Ex parte Gouthro*, 296 Fed. 509, affirmed 8 F. 2nd 1023. Petitioner relied upon the decision of the Inspector and filed his Declaration of Intention, became a legal resident and eight years after admission obtained a judgment fixing his status and renounced his allegiance to the King of Italy. Judge Perry held (App. 261) that petitioner committed a fraud on the American Consul in Italy, but there is not a scintilla of evidence to support any such finding. The Government suppressed evidence as to what transpired before the Consul.

We quote from *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, as set out in *Vannopoulos* v. *Robinson*, 247 F. 2d 655, 658:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The rule is stated in *Zito* v. *Moatal*, 174 F. Supp. 531, 537 and authorities are collected *in re* inferences drawn by an administrative trier of fact. The test of substantial evidence is not satisfied by evidence which gives equal support to inconsistent inferences.

Judge Perry (App. 261) found that petitioner had not previously used the name Paul Maglio. This is contradicted by the record. The Hearing Officer and the Courts below ignored the legal effect of the judgment entered by Judge Wilkerson changing the name of petitioner.

We must give credit to the assumption that the Hearing Officer and the officials of the Board of Appeals knew that in 1920 violation of the Passport Act did not authorize

deportation. Their contrary decision can be understood, we submit if Your Honors determine from the record that the Administrative body construed the McCarran Act, Section 241 (a) (1) of the Immigration and Nationality Act, to express the intention of Congress to put all aliens back at our gates and to treat them as if they were just arriving. The administrative officials have failed to heed *Shaughnessy v. United States*, 345 U.S. 206, 212, where it was said that aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to due process of law.

When petitioner obtained his visa the burden was on him. The fact that he satisfied the Consul is shown by the issuance of the visa. To say now that he met that burden by some fraudulent misrepresentation is arbitrary, in the absence of any evidence as to what representations were made.

In the absence of the production of evidence in the possession of the Government, we assume that the American Consul was informed as to any trouble petitioner may have had with the authorities in Italy. If in fact petitioner was convicted of a crime in his youth, the American Consul was in a better position to determine whether or not it included moral turpitude than the Hearing Officer, guessing fifty years later and thousands of miles from the scene.

> "Failure to produce evidence within the control of a party raises the presumption that, if produced the evidence would operate against him; and every intendment will be resolved in favor of the opposite party; * * *" *Shuell v. London Amusement Co.*, 123 F. 2d 302, 306.

Also please see cases cited in 31 C.J.S., Evidence, § 156, p. 847.

The Government Suppressed Important Evidence Within the Control of its Officials.

As far as this record discloses, the Consul knew, at the time of the visa, all that has been learned since that date by all of the other departments of the government put together. It is fair to assume that Mr. Rando (App. 154) at the time of his investigation in 1957 knew of its purpose and had such information as Your Honors may now derive from the various exhibits in evidence. Mr. Rando knew that from his Declaration of Intention (App. 267) and Petition for Naturalization (App. 212) petitioner arrived on the steamship Ryndam, after embarking in France. Mr. Rando knew that petitioner passed inspection at New York and was admitted as the bearer of a passport together with a visa. Mr. Rando also knew the name on the passport and of the fact that petitioner had had this name changed by Judge Wilkerson. Not a word did Mr. Rando say as to whether petitioner had used the name Maglio in France or Italy. Surely Mr. Rando must have inquired. One of the first things Mr. Rando did, no doubt, was to inquire about the passport and the visa. The fact that he did not tell Judge LaBuy what was learned by him and the fact that he did not produce any papers or records concerning the passport and the visa issued to petitioner, must compel any fair minded person to conclude that the passport and the visa were found by him to have been regularly issued. Mr. Rando obtained copies of birth and death certificates, marriage records and various papers purporting to show a criminal record. Now we know from the various documents put in evidence that Mr. Rando must have known, in view of the pendency of a denaturalization suit, that the passport and visa might be drawn into question.

Is it not fair to assume that Mr. Rando inquired of the American personnel and inspected the records, to de-

termine how much the Consul knew about the personal history of petitioner and whether or not that official had been deceived? Of course we know that that must have been one of the first things Mr. Rando inquired into. Yet we do not find a word in his testimony concerning such matters.

Is it not fair to conclude that if petitioner had misrepresented anything or sworn falsely before the American Consul that the Government would have proven the fact? In the absence of this evidence, petitioner should have been afforded a presumption which has been ignored to date, although often requested below.

We assume that when Mr. Freedman prepared the subpoena (Ex. 59 A, App. 277) he expected to be required to prove, either by direct evidence, or by secondary evidence, just what travel documents were used at the time of entry. The situation was altered when the burden had been improperly shifted to petitioner at the hearing.

When petitioner signed his name to his Petition for Naturalization, we know from the evidence that the Naturalization Examiner knew that he had used two names. When petitioner applied for his visa we do not know anything about the names used because the evidence was suppressed. When petitioner applied for entry, we do not know what the Inspector knew about names used because of the absence of evidence on the subject.

The Hearing Officer Considered Matters Not Introduced in Evidence in the Absence of Proof.

We quote from *Yiannopoulos v. Robinson*, 247 F. 2d 655, 657:

> "Rather, it is the overall denial of justice which impels our conclusion. Suffice it to say, that, without the admission of this evidence, it is, at least, highly un-

certain whether the finding of the Special Inquiry Officer would have been made. It is on this basis that we conclude that the hearing was unfair." This line of thought finds support in the language of the Supreme Court in *Bridges* v. *Wixon*, 326 U.S. 135, 156, "In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong * * * or by showing that incompetent evidence was admitted and considered * * * *But the case is different where evidence was improperly received and where but for the evidence it is highly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing* * * *." p. 658) (Emphasis supplied by Judge Lindley)

We carry our argument a step further and contend that the evidence improperly received was insufficient to stop up the gap left in the evidence by the Government at the close of the case before the Hearing Officer. The improper evidence took the Hearing Officer off on the wrong track. We might have prevented this if the improper evidence had been introduced in our presence.

The Hearing Officer and the Courts below failed to notice the variance between

(a) Voluntary homicide and

(b) Voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.

One should not assume that (a) and (b) are alike. One would have to gain some knowledge of Italian law in order to understand (b). We have no such crime in the United States. There had been no proof of the law of Italy. In our absence, after the hearing closed, the Hearing Officer attached to his opinion an appendix purporting to be part of an Italian code. He based an argument on this code

to the effect that (a) is a crime involving moral turpitude. An administrative body cannot take notice of a foreign law. *United States* v. *District Director of Immigration*, 106 F. 2d 14. The Court of Appeals said that our point could be avoided on the ground that standards in use in the United States could be applied. We contend that if the conviction had been for murder or larceny, or some crime known here, that might be true, but the conviction was for (b) which leaves the matter in confusion.

The statute, 8 U.S.C.A.—1252 (b) provides that:

> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross examine witnesses presented by the Government.

The Hearing Officer said (App. 122):

> "The pertinent statutory provision relating to voluntary homicide is Article 364 of the Italian Penal Code, which was in existence in Italy at the time of the offense in 1915 and the conviction in 1917."

Nowhere in the record can be found any evidence to show that this was the pertinent statute, or that it was in existence at the time of the offense or conviction. The record, including the evidence taken in our absence, does not purport to show that the five codes constituted all of the law of Italy on the subject.

In the United States, the term Homicide includes killings without moral turpitude. In the absence of any proof on the subject we assume that the law of Italy also provides for homicides that are not murder or manslaughter. The reasoning of the Hearing Officer seems to go like this:

> (a) I find a definition of a crime in the statute.
>
> (b) I believe that the definition is intended to cover crimes in which there had been moral turpitude.

(c) I assume that the conviction shown in Exhibit 36 was for the crime I find in the definition.

Ex. 37 (App. 227) shows:

"Title of Crime—Attempted Homicide"

This should have warned the Hearing Officer that the word "Homicide" may not mean manslaughter. In this country there is no such crime as assault with intent to commit manslaughter. *People* v. *Moore*, 146 Ill. 600. The term "Attempted Homicide" would be meaningless without more evidence as to the law and the indictment.

Your Honors know that in the United States our laws provide for killing without criminal intent, *e.g.*, as in self defense or in defense of habitation, or as in killing by misadventure. In the absence of proper proof as to the nature of the crime, the Hearing Officer was left to speculate that a crime involving moral turpitude had been involved. Your Honors know that in this country a crime might originally be a serious one as to the charge and reduced in turpitude by a court after the evidence has been heard. See footnote No. 14 to *Ablett* v. *Brownell*, 240 F. 2d 625, 631 for Section 4 of the Act of September 3, 1954, 68 Stat. 1145-1146, 8 U.S.C.A. § 1182 (a), concerning crimes in which the punishment was reduced. See also *Calvillo* v. *Robinson*, 271 F. 2d 249, 250. See footnote 341 U.S. 236, for opinion of Attorney General on moral turpitude. The record made before the Hearing Officer left all such matters as to the law and the practice of Italy to speculation.

Reference is made in Ex. 38 (App. 231) to the acquittal of one defendant in a previous trial. Without the indictment in evidence as to any of these cases, the Hearing Officer was left to speculate on the legal effect in Italy of this acquittal.

One may kill intentionally under the law in this country without moral turpitude. We do not know about the law of Italy because the Government failed to prove that law, or to make any attempt in our presence. The Court of Appeals said, herein p. 849:

> "It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term 'voluntary' indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable."

The fact that the sentence was for 2 years, 6 months and 16 days and a pecuniary penalty of 145 lire (App. 225) should have put the Hearing Officer on notice that probably the Italian Officials were dealing with a crime which did not include moral turpitude. From Ex. 39 (App. 234, 237, 238) we observe that a defendant to have "partial mental defect" and another declared to be "partially unbalanced mentally at the time" were given reduced sentences because of this condition. This should have warned the Hearing Officer to not rely on inferences to be drawn from records showing a practice different from ours. Here a sentence was imposed on one defendant in his absence, but that sentence was void under our standards. If one negates the possibility of a killing being justifiable that does not negate a killing being without moral turpitude, as for instance, a killing under compulsion of another. We repeat from the above quote from the Court of Appeals

> "* * * the fact that a sentence was imposed negates any possibility that the killing was justifiable."

The killing could not be justifiable, yet it could lack moral turpitude. The entry of a sentence in Italy does not have the same legal significance as it would a sentence in the United States. An inspection of Ex. 36, 37, 38 and 39 will show many sentences unknown to our law.

So we present this confusing picture, Judge LaBuy and the Hearing Officer inquired into the circumstances in order to identify petitioner as to the person named in the various documents. Then after the Hearing Officer makes his inquiry, consults the documents and holds that the papers from their content show a crime of moral turpitude, we seek to point to further circumstances to show lack of premeditation, extenuating circumstances and absence of moral turpitude, then we are told by Judge Perry that the Hearing Officer should not have looked at the contents of the various exhibits. We are told by the Court of Appeals that it was not necessary for the Hearing Officer to look. The Hearing Officer looked until he found support for his adverse conclusions then when we look at the same material in order to point to the lack of evidence from which to find the fact of conviction of petitioner of a crime involving moral turpitude, we are denied the right to look at the circumstances on which the Administrative officials founded the order of deportation. Petitioner asserts that if the Government had proved voluntary homicide as charged in the deportation rule and the law of Italy designated voluntary homicide as a crime including moral turpitude, that would be one thing; but when the record of conviction shows something different than voluntary homicide, as we know it, the very terms of the conviction demonstrates lack of moral turpitude.

Ex. 37 (App. 277), purports to be a prison record. No law was produced to show that such record is required, or where the information was obtained. It is fair to assume that any prison record would also show the date of discharge of the prisoner. This portion was suppressed by the Government. If this prisoner was in fact petitioner, he may have left prison and have gone to France before the date of the conviction on May 18, 1917 in Ex. 20 (App.

224). No prison record or any other evidence was produced to show that the person convicted in Ex. 36 ever entered any prison. This gives rise to the view that if all of the records had been produced, they would show that the defendant named in Ex. 36 was not in Naples on May 18, 1917, the day of sentence.

When Judge LaBuy decided that petitioner had not truthfully answered a question about an arrest, all Judge LaBuy was required to look for in the various exhibits was evidence that petitioner had in fact been arrested in Italy. It was not necessary for Judge LaBuy to find that petitioner had been convicted. On the other hand, it was necessary for the Hearing Officer to find that petitioner had been convicted. The evidence heretofore considered by Judge LaBuy was deficient to prove conviction. The Hearing Officer endeavored to put it up this deficiency by resort to evidence taken in our absence and failed to fill the gaps in proof. The lack of similarity of the law of Italy and the law of the United States is shown by Ex. 38. (App. 229)

We adopt the dissent in *Jordan v. DeGeorge*, 341 U.S. 223, 232, as our argument to the effect that the phrase "crime involving moral turpitude" lacks definite standards, hence the statute is unconstitutional for vagueness.

There was no proper evidence to identify petitioner as the person named in Ex. 36 (App. 224). *People v. Casey*, 396 Ill. 374, 378.

Motion Pursuant to Rule 60 (b).

Petitioner filed a motion for leave to file a petition in the District Court, herein p. 865. Suggestions were attached, herein p. 865. The Government made answer, herein p. 868. The Court denied the motion, herein p. 871, without opinion. An argument in favor of petitioner is

to be found in *Polites* v. *United States*, 365 U.S. 426, including the dissenting opinion. The change or clarification of the law accomplished since the decree is to be found in a number of cases, including *Jaimes* v. *United States*, 366 U.S. 223.

In *United States* v. *Profaci*, 274 F. 2nd 289, it was held that in proceeding to set aside naturalization decree on ground that defendant had fraudulently concealed a foreign arrest in naturalization proceedings, proof of the actual state of defendant's mind had to establish strong inferences of falsification if citizenship was to be revoked, and where contents of questions to which false answer assertedly was given was not reasonably free from ambiguity, clear understanding thereof and intent to deceive were not readily to be implied merely from false answer.

It is suggested that petitioner should be given an opportunity to show that the decree should be set aside. In such event the deportation order should fall. In view of the fact that the Hearing Officer and the Courts below have followed dictum rendered by Judge LaBuy and the District Court Opinion is ambiguous, petitioner should be afforded the right to a clear statement of the facts and the law from the District Court.

C.
ARGUMENT.

Conflict in Construction of the McCarran Act as to Status Acquired by Petitioner.

There is a conflict between *United States ex rel Zacharis* v. *Shaughnessy*, 221 F. 2d 578, decided in the Second Circuit and the case at bar in the Seventh District. The *Zacharis* case construed the McCarran Act, §405(a), 8 U.S.C.A. §1101 note, to give an alien a "status condition, or right in process of acquisition" as to which statutes repealed by the McCarran Act were continued in force by saving clause. In the case at bar, the Court of Appeals held that the savings clause did not apply, although petitioner had taken steps to become a citizen under prior law and long before the enactment of the McCarran Act. We quote from the opinion by Judge Clark in *Zacharis*, 221 F. 2d 578, 580, after citing *Shomberg* v. *United States*, 348 U.S. 540 and *United States* v. *Menasche*, 348 U.S. 528:

> "The Court's willingness to recognize inchoate rights, expressed also in its disapproval of the majority decision of this court in *United States ex rel Abo-astam* v. *Carr*, 2 Cir., 147 F. 2d 342, and approval of the contrary decision in *Bertoldi* v. *McGrath*, 86 U.S. App. D.C. 1, 178 F. 2d 977, strongly suggests that here the earlier law must be given effect. * * *" (581). We conclude that the preliminary application for the visa in September, 1952, was sufficient to bring Zacharis within §405(a). This application was the first step in his effort to attain a legal status in this country".

Conflict as to Doctrine of Res Judicata.

In the Third Circuit, in *Anselmo* v. *Hardin*, 253 F. 2d 165, it was held that the doctrine of res judicata applied where an alien had previously secured a judgment fixing his sta-

tus in a deportation proceeding. In the Seventh Circuit in the case at bar, the Court of Appeals has refused to apply such doctrine.

Conflict as to Jurisdiction in re Denaturalization.

Judge Perry, affirmed by the Court of Appeals, held that (App. 257), herein p. 838?

> "This court is of the view that illegal procurement as a ground for denaturalization was saved by Section 405(a) of the Immigration and Nationality Act of 1952."

Judge Rives in the Fifth Circuit in *United States v. Stromberg*, 227 F. 2d 903, 907 said:

> "We hold, therefore, that, after the effective date of the McCarran Act as to actions not then pending, illegal procurement was not continued as a ground for denaturalization."

In the Seventh Circuit in *United States v. DeLucca*, 250 F. 2d 487, 491, the Court of Appeals interjected illegal procurement as a ground for denaturalization, this interjection was quoted by Judge Perry in the case below as follows (App. 257), herein p. 838:

> "* * * We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was *illegally* and *fraudulently* procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied by Judge Perry.)

It is important that the law be settled by Your Honors. If the law is to be held as correctly stated in the Fifth Circuit in *Stromberg* and the Court of Appeals in the Seventh Circuit is wrong a prejudicial error has been committed. If illegal procurement was not continued by Congress, Judge LaBuy had no jurisdiction to decide the questions

thought by Judge Perry to have been decided. Also the interjection of illegal procurement by the Court of Appeals was an interjection of a matter beyond the jurisdiction of Judge LaBuy. *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529, and *Pair v. United States*, 363 U.S. 370, 388, should have reminded the courts below that findings and theories should not enter any case for the first time on appeal. Judge Perry in quoting the portion interjected by the Court of Appeals erred in not applying the rule stated in 50 C.J.S. Judgments §§622, 624 pp. 36-50:

> "A judgment affirmed on appeal is final and res judicata provided the judgment is of such nature that it would have been final and res judicata in the absence of an appeal."

If Judge Perry had followed the law as stated in the Fifth Circuit in *Stromberg* and had considered the opinion and findings made by Judge LaBuy without following the interjected matter, Judge Perry might then have decided to discharge petitioner.

By interjecting illegal and fraudulent procurement into the decree entered by Judge LaBuy, the Court of Appeals could possibly justify its erroneous view, later expressed in the case at bar, herein post, that the LaBuy decree made the entire proceedings void. When it comes time in the case at bar to consider whether or not the LaBuy decree resulted in cancellation to date back to 1928 or to be effective only from 1957, the presence or absence of jurisdiction over illegal procurement may make a difference.

Judge Goodman said in *United States v. Reclassified*, 181 F. Supp. 75, 78:

> "Ever since 1906 when the Congress first provided by statute for denaturalization on the ground of 'fraud' or on the ground that the certificate of naturalization was 'illegally procured', 34 Stat. 596, 601, the

> Courts have wrestled with the interpretation of the term 'illegally procured.' A variety of meanings have been ascribed to it by the lower federal courts. The United States Supreme Court has applied the terms in specific factual situations, but has never provided a general definition."

We respectfully submit that the case at bar points up the need to explain, clarify and distinguish the cases with which the Courts have wrestled. In *United States* v. *Minker*, 250 F. 2nd 721, 730, Judge Finnegan said that there is a delusive exactness about the words "*concealment*" and "*material fact*."

Conflict as to Passport Act.

In *United States* v. *Corsi*, 57 F. 2d 868, affirmed 61 F. 2d 1043, in the Second Circuit, the alien contended that the statute did not extend the power to deport. Judge Coleman said, p. 869:

> "This contention is directly contrary to the decision of the Court of Appeals of the Eighth Circuit in *Delaney* v. *Moore*, 28 F. 2nd 185, [illegible] finds some support in the Seventh Circuit *United States ex rel Ochera* v. *Smith* (D.C.) 26 F. 2nd 563, reversed on another ground (C.C.A.) 46 F. 2nd 220 and in the Third Circuit *United States ex rel Chin* v. *Weeks* (D.C.) 24 F. 2d 707) but it seems contrary to the general tenor of the decisions in our own circuit. *Goldsmith* v. *United States*, 42 F. 2d 132; *United States ex Petrizio et Alfro, ex rel Graber* v. *Kaxiath*, 30 F. 2nd 242; *United States ex rel Lazarus* v. *Watkins* (D.C.) 278 Fed. 518; *United States ex rel London* v. *Phelps*, 22 F. 2nd 288. The weight of authority is on the side of reason in this case and the writ must be dismissed."

We submit that if the status of aliens who entered the United States in 1920 is to be reexamined today by virtue of the McCarran Act as if the aliens were at our gates, it becomes important that the law be settled on this point by this Honorable Court.

Conflict with a Decision of a District Court in Another Circuit

In *United States v. Marff*, 2nd Circuit, 175 F. Supp. 182, Judge Dimock has held that the burden of showing the [illegible] rests upon the deporting power. This conflicts with *Uhrdes v. Holland*, 2nd Circuit, 245 F. 2d 812. The Hearing Officer in the case at bar took the same view as expressed by Judge Hastie in *Uhrdes*. We again quote from Jurisdiction of the Supreme Court of the United States by Wolfson and Kurland, § 326 and refer to the cases there cited:

> "Cases are by no means wanting where certiorari has been granted upon a showing, *inter alia*, that the decision sought to be reviewed is in conflict with that of a District Court or Court of Appeals of other circuits. It would only be misleading, however, to suggest that in these cases the writ issued because of that conflict. In each, other considerations shown by the opinion must be taken into consideration in order to arrive at a true estimate of the reasons for granting the writ. In many instances the conflict appears to be an insignificant factor. In other instances, where the District Court decision relied upon is well reasoned and has been approved by a number of a similar character, its worth as a precedent can undoubtedly be weighed heavily in considering the reason that the decision sought to be reviewed is erroneous and should be reversed in the interest of the law and justice. It is one factor with the weight of authority."

Reasons for Asserting that Lehmann v. Carson, 353 U.S. 685 does not control here

Two grounds were involved in *Carson*:

(a) Entry without inspection

(b) Conviction after entry

In *Barber* v. *Hong*, 254 F. 2d 382, an alien who entered before July 1, 1924, without inspection, was held to have been deportable. Judge Mathews said that the *Carson* case was not distinguishable. In a footnote Judge Mathews said:

> "As to whether appellee had any such status [not deportability] prior to December 24, 1952 we express no opinion."

We submit that in *Carson* Your Honors need not directly express an opinion on grounds (a) above. In the case at bar there are no such grounds as (a) and (b).

We have examined the brief submitted by attorneys for Carson and conclude that many questions were raised which Your Honors did not undertake to decide. The Attorneys for Carson furnished the result of research in support of the following, p. 12:

The 1952 Savings Clause, the Broadest ever enacted by Congress, requires application of the 1917 Immigration Act to Respondent and Preserves his status thereunder.

As a reminder that Your Honors left much of the dispute between the parties undecided, we quote from the Carson brief, p. 13:

> "Petitioner's [Government's] brief, however, puts solely for the first time to claim that respondent [Carson] did not have a status under prior immigration legislation which could be preserved by the 1952 Immigration Act (Brief p. 24, 435, Brief p. 19, No. 72). Petitioner states that 'mere nonaction' of Congress does not grant an 'affirmative privilege' or status (Brief, No. 72, p. 20) that 'in the absence of some affirmative action by Congress extending to such aliens a privilege of this nature, the savings clause has no application' (Brief, No. 435, p. 26), and finally that peti-

> ...tioner applied no vested right to escape deportation.

It appears that the Attorneys for Carson had a difficult time for the reason that the Government took the position that Carson had failed to appeal to preserve his status. In Appendix [illegible] we quote further from the brief submitted to Your Honors on behalf of Carson.

In the absence of anything to be found in the opinion in *Johnson v. Carson* touching on whether or not some affirmative action on the part of the alien would have made any difference, we respectfully submit that Your Honors have left open questions raised in the case at bar. We again quote from the decisions of the Supreme Court of the United States by Wolfson and Kurland, p. 341 and refer to the cases cited:

> "The Supreme Court at its opinions occasionally will reserve expressly or refuse to decide questions of law urged by counsel or suggested by the issues. When certiorari is applied for in a subsequent case, which appears to involve the question thus reserved, the reservation in the earlier Supreme Court opinion may properly be urged among the grounds why the writ should issue. The Court, that, [illegible] on a question in one case, [illegible] has been required to resolve such questions which it could not or would not decide in the earlier case."

Also see footnote in *Sinclair v. United States*, 279 U.S. 263, 299, where Mr. Justice Clark said:

> "This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under §241 (a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings. Whether the question of deportability could be raised in a naturalization pro-

ceeding was expressly waived by the petitioner. See Petitioner's Brief, p. 7."

We quote from Mr. Justice Whittaker, 353 U.S. 685, 690:

"It seems to us indisputable; therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved."

In the companion case *Maldonado v. Catalanotte*, 353 U.S. 602, 604, where the alien was convicted of a law relating to narcotics, Mr. Justice Whittaker said:

"It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved. The case is, therefore, 'otherwise specifically provided' for within the meaning of § 405(a)."

We are led to believe that in both cases Your Honors paid particular attention to the convictions in this country. No such ground is involved in the case at bar.

We again quote from the *Carson* brief, p. 13:

"Finally, we submit that the real issue here is not one of statute, but rather one as to which law governs, the old or the new, and whether section 241 (d) by specific provisions prevents the continuation of the old laws protected by the savings clause. Proper analysis of this issue initially directs attention to the Congressional History of the savings clause."

In the case at bar it does not matter whether the old or new law be used as a guide, insofar as the final result is concerned. Under the old law, petitioner was not deportable. If the new law is to be understood that Congress intended to have it apply to petitioner, the new law is then unconstitutional, as being in disregard of the doctrine of *res judicata*.

In *Ankeboi vs Hardin*, 253 F. 2d 165, Judge Kalodner said that the *Carson* and *Catalanotte* cases were inapposite, p. 172:

> "In the latter two cases there had not been a judgment prior to the deportation proceedings determining the non-deportable status of the alien sought to be deported as there was in the instant case."

In the case at bar there had been a judgment about thirty years prior to the deportation proceedings, establishing that petitioner had entered legally and had become a resident. Judge Kalodner said, p. 171:

> "Its (the Government's) contention that Section 241 (d) of the 1952 Act 'expressly excepts the charge of deportability for entry without inspection from the application of the "savings clauses" in Section 405(a)' is tantamount to an assertion in the instant case that the 1952 Act has made inapplicable to deportation proceedings the doctrine of *res judicata*. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government."

So it appears that in *Carson* probably Your Honors did not choose to discuss the questions now submitted for the following reasons among others:

(a) The case at bar presents facts not present in Carson.

(b) If the McCarran Act is to be construed to make an alien deportable because of an illegal entry, over forty years ago and about thirty years after a judgment establishing legal entry and residence, the McCarran Act is unconstitutional.

Mr. Justice Clark said in *Shomberg* v. *United States*, 348 U.S. 540, 546:

> "If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the new Act *affects* petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exception. Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play. Only then is a specific exception to §405 required."

In the case at bar, the grounds for deportation are not the same under the prior law as those found to exist by the Hearing Officer under the McCarran Act. Whether or not the savings clause is brought into play is but one of many questions here submitted. It is a question as to whether or not Congress by the new law intended to introduce a change in the status acquired by petitioner. As to Shomberg Your Honors said, p. 542:

> "Petitioner was eligible for citizenship under the prior law and remains eligible under the new Act. But under the prior law petitioner was not deportable."

The same can be said of petitioner in the case at bar. As was said of Menasche in *United States* v. *Menasche*, 348 U.S. 528, 530:

> "Accordingly, all other prerequisites to citizenship having been satisfied, respondent was entitled to be naturalized under the Nationality Act of 1940 upon completing five years of residence. 54 Stat. 1142, 8 U.S.C. (1946 ed.) §707."

Petitioner was entitled to be naturalized under the Act in force in 1928 insofar as legal entry and lawful residence

are concerned. The Certificate of Naturalization granted to him was taken from him by something he had done or failed to do in his dealings with the Naturalization Officials. The cancellation did not change the status he had acquired as to residence previous to the date of executing his Preliminary Form on February 2, 1928 (App. 296). Mr. Justice Clark said in *Menasche*, p. 535:

> "If Congress was willing to preserve a 'mere condition, unattended by any affirmative action,' we think its savings clause also reaches instances, such as this, where affirmative action is present. The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress . . .
>
> (538) "The few decisions considering this problem under the 1952 Act accord with the decisions of the District Court of Appeals in the instant case, holding that §405(a) preserves rights accruing in the pre-petition stages of the naturalization process. *United States v. Primak*, 242 F. 2d 878, affirming 122 F. Supp. 90; *In re Jacson*, 117 F. Supp. 528. We believe that Congress so intended."

The need to explain, clarify or distinguish Lehmann v. Carson, 353 U.S. 685.

We quote from an opinion by Judge Stewart in *United States* v. *Kershner*, 228 F. 2nd 142, 146:

> (3) "We conclude that Carson's status of nondeportability is protected by section 405 of the Act, since the statutory provisions upon which appellee relies do not constitute such specific exceptions to section 405 as are contemplated in that section in order to make it inapplicable."

In the case at bar the Court of Appeals said, herein p. 85a:

> "Respondent cannot avail himself of the protection contained in the savings provisions of Section 405(a). This section provides among other things that prior statutes and statuses shall be continued in force and effect '. . . unless otherwise specifically provided herein . . .' The Supreme Court in *Lehmann* v. *Carson* (353 U.S. 685) held that Section 241 (a) (1) of the 1952 Act does 'otherwise specifically provide' for the deportation of any alien who at the time of entry was excludable by the law existing at that time, and that Section 241(d) makes 241(a) applicable to all aliens 'notwithstanding (1) that any such alien entered the United States prior to 1952 or (2) that the facts by reason of which any such alien belongs to an excluded class occurred prior to 1952'. The Court concluded that it was 'undisputable therefore that Congress was legislating retrospectively, as it may do . . .'"

Whether or not the conflict which exists between *Kershner* in the Sixth Circuit and the case at bar in the Seventh Circuit has been settled by *Lehmann* v. *Carson*, 353 U.S.

ex depends upon what Your Honors intended to settle by *Carson*. Carson came to the United States without inspection and had done nothing to attain a status of nondeportability. The Courts below in the case at bar failed to note the effect of these distinguishing features.

Our reading of *Carson* leads us to contend that Carson was finally ordered deported because of his two convictions. When two grounds are alleged for deportation, the Government need sustain only one. After one ground was sustained by Your Honors, which ground did not involve illegal entry, this Honorable Court apparently did not deem it necessary to express a view as to whether or not Carson had attained a status because of the failure of the Government to proceed within five years on the stowaway charge. Mr. Justice Whittaker said, p. 690:

> "It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved. This case is, therefore, 'otherwise specifically provided' for within the meaning of §405 (a). The Court of Appeals was in error in holding to the contrary, and its judgment is *Reversed*."

The headnote is as follows:

> "(a) The saving clause in §405 (a) of the 1952 Act is inapplicable where 'otherwise specifically provided,' and §241 contains provisions which specifically provide otherwise with respect to the circumstances involved in this case."

Of course the circumstances in the case at bar are different. Petitioner was not a stowaway. The order to show cause (App. 8) does not include a charge of two convictions. We believe that our understanding of the import of the opinion rendered by Mr. Justice Whittaker is con-

firmed by the concurring opinion by Mr. Justice Black, from which we quote, p. 690, 691:

> "I agree with the Court that §241 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1251, makes aliens deportable for past offenses which when committed were not grounds for deportation * * * Both respondents are ordered deported for offenses they committed long ago—one in 1925 and the other in 1936. Long before the 1952 Act reached back to deportation as one of the legal consequences of their offenses both paid the price society then exacted for their misconduct."

Carson entered the United States in 1919, so Mr. Justice Black was clearly considering events which took place after entry and so understood Mr. Justice Whittaker.

In *Lehmann v. United States*, 248 F. 2d 519, we respectfully submit, that the Court of Appeals failed to see the point we make and failed to correctly understand the case as decided by Judge McNamee, *United States ex rel. Scivia v. Lehmann*, 136 F. Supp. 458, from which we quote:

> "His criminal record furnishes no ground for deportation. His expulsion from this country is sought and was ordered solely upon the grounds alleged in the Warrant of Deportation, which are:
> That the petitioner is subject to deportation under "Sec. 241 (a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, a stowaway, under Sec. 3 of the Act of Feb. 5, 1917 and a person who had not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918 and the Executive Order in effect at the time of entry."

Please keep in mind the following which we again quote from *Schneiderman v. United States*, 320 U.S. 118, 160:

> "A denaturalization suit is not a criminal proceeding but neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

If Judge McNamee has stated the case correctly, the two convictions were out of the *Scarpa* case. Yet the Court of Appeals based its decision on the two convictions. We quote, 248 F. 2d 519:

> "He has been twice convicted and sentenced to penal servitude for two offenses violating, respectively, the law of West Virginia relating to unlawful liquor traffic and the law of Ohio covering blackmail. In a careful opinion, United States District Judge McNamee gave well-considered reasons for his action in granting the petitioner's application for writ of habeas corpus.
>
> In behalf of the government, the appropriate Officer in Charge, United States Immigration and Naturalization Service, has appealed from the district court's order; and the United States Attorney for the Northern District of Ohio has prosecuted this appeal.
>
> Since the opinion of the United States District Judge was written, the Supreme Court *(Lehmann v. United States ex rel. Carson*, 353 U.S. 685), has decided the issues here involved against the contention of the petitioner appellee and contrary to the decisions of the district court. The Supreme Court held that the savings clause, section 405, of the 1952 Immigration and Nationality Act, 8 U.S.C.A. §1101 note, does not preclude deportation under section 241 (a) (4) and (b), 8 U.S.C.A. §1251(a) (4), (b) of an alien who has entered this country in 1919 as a stowaway and who had received a conditional pardon for one of two convictions in 1936, the alien not having been deportable until the 1952 Act became effective. The *Carson case* is not distinguishable from the case at bar."

We quote from JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES by Wolfson and Kurland §371 and refer to the cases there cited:

> "While the Courts of Appeals often concede conflict with, and refuse to follow, courts of equal or lesser rank in the other circuits, they recognize, of course, the binding force of Supreme Court adjudications. Nevertheless, cases are frequent enough where through oversight or inadvertence or misunderstanding, the court below has failed to apply or has erroneously applied an applicable decision of the Supreme Court. * * * For in exercising its discretion upon the writ, the Supreme Court is not concerned so much with error as with elimination of uncertainty and confusion in the application of federal law. And in many cases the Court has granted the writ in order to explain, clarify or distinguish its prior decisions."

In the case at bar petitioner had acquired two anchors before the date of the McCarran Act

(a) a lawful permanent alien resident,

(b) a valid Declaration of Intention on file.

As to the effect of (a) alone, see *Petition for Naturalization of Medalion*, 173 F. Supp. 249; *Petition for Naturalization of Zaharia*, 166 F. Supp. 314. As to the effect of (b) see, *Petition for Naturalization of Rosenbaum*, 171 F. Supp. 141; *In re Naturalization of Wolff*, 270 F. 2nd 422.

Petitioner having entered prior to July 1, 1924 cannot be deported for illegal entry.

In *Bonnedsen v. Nelson*, 2 F. 2nd 296, 298; *United States v. Smith*, 36 F. 2d 503, with the approval of the Court of Appeals, 46 F. 2d 229, 230 and *Engel v. Zurbrick*, 51 F. 2d 632, 633, it was held that the Passport Act affords no warrant or authority for deportation. Also see *United States v. Lehmann*, 136 F. Supp. 458. In the case at bar the Administrative Agency held otherwise and the court below.

in effect, has held that the Passport Act is authority for deportation. If Your Honors accept our view the Court of Appeals in 248 F. 2d 519 did not reject the argument made by Judge McNamee concerning the Passport Act. We quote from 136 F. Supp. p. 461:

> "The provisions of former Section 728(b) were probably designed primarily for the benefit of aliens who lawfully entered this country prior to July 1, 1924 and of whose admission there was no available record. However, under the broad designation of 'any alien' whose entry was before that date the section was applicable as well to aliens who entered the United States unlawfully but who were in all other respects qualified to apply for the benefits of the section. See *Linklater* v. *Perkins*, 64 App. D.C. 69, 74 F. 2d 473. Section 728(b) was reenacted in the Act of 1952 where it appears as Section 1259. There are a few slight changes in phraseology and arrangement of the text in the new section, but in scope and effect it is identical with former Section 728(b). It would seem, therefore, that Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the United States prior to July 1, 1924 to apply for a status of permanent residence in this country. Kansas, in his work entitled 'Immigration and Nationality Act, Annotated,' has this to say of the effect of former Section 728(b) and Section 1259 of Title 8 U.S.C.A.:
>
> > 'However, if he (the alien) entered prior to July 1, 1924 and has not departed since, he cannot be deported for illegal entry alone. (Act of March 2, 1929, as amended, August 7, 1939.) Carried over into the Act of 1952.' P. 123.
>
> See also Commentary on Immigration and Nationality Act of 1952 by Walter M. Besterman, pp. 65, 66, Vol. 1, Title 8 U.S.C.A."

We quote further from the same book by Kansas, p. 125 in commenting on the authorities:

> "Here again the date of July 1, 1924, controls as to deportation for illegal entry. * * * The July 1, 1924, date protects him so long as he remains on United States territory. * * * In deportation proceedings for unlawful entry there is no time limit for deportation if entry was made subsequent to July 1, 1924. *Philippides* v. *Day*, 283 U.S. 48; *U. S. ex rel. Fink* v. *Reimer*, 96 F. 2d 217, affirming 16 F. Supp. 487; *Bhagat Singh* v. *McGrath*, 104 F. 2d 122)."

If it now be held that *Lehmann* v. *Carson*, 353 U.S. 685, is authority for deportation of an alien who entered prior to July 1, 1924, without inspection, we point to the fact of inspection in the case at bar and the subsequent acquisition of lawful residence in order to distinguish *Carson*.

Here again we submit that Your Honors should grant certiorari in order to eliminate uncertainty and confusion in the application of federal law and to explain, clarify and distinguish prior decisions.

Ex Post Facto.

Judge Perry, affirmed by the Court of Appeals, said (App. 258), herein p. 834:

> "Petitioner contends that §241 of the Immigration and Nationality Act of 1952 (8 U.S.C. §1251) constitutes retrospective legislation, not within congressional power because of Article I, §9 of the Constitution which provides that 'No bill of attainder or *ex post facto* law shall be passed.'"

and after quoting from a number of cases Judge Perry said (App. 259), herein p. 837:

> "In spite of the decisive language of the Supreme Court, this court overrules petitioner's contention that §241 of the Immigration and Nationality Act of 1952 is unconstitutional as an *ex post facto* measure."

Mr. Justice Black said, concurring in *Lehmann v. Carson*, 353 U.S. 685, 690:

"The Court goes on to hold, however, that such retrospective legislation is a valid exercise of congressional power, despite Art. I, § 9, of the Constitution providing that 'No Bill of Attainder or *ex post facto* Law shall be passed.' Past decisions cited by the Court support this holding on the premise that the *ex post facto* clause only forbids 'penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment.' *Harisiades v. Shaughnessy*, 342 U.S. 580, 594. I think this definition confines the clause too narrowly. As Mr. Justice Douglas pointed out in his dissenting opinion in *Marcello v. Bonds*, 349 U.S. 302, 319, another line of decisions by this Court has refused to limit the protection of the clause to criminal cases and criminal punishments as those terms were defined in earlier times. *Fletcher v. Peck*, 6 Cranch 87, 138, 139; *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333. And see *United States v. Lovett*, 328 U.S. 303, 315, 316.

"What is being done to these respondents seems to me to be the precise evil the *ex post facto* clause was designed to prevent."

Please see also the dissenting opinion by Mr. Justice Douglas in *Marcello v. Bonds*, 349 U.S. 302, 319.

We respectfully request reconsideration of the subject of retroactive legislation as applied to deportation.

The Savings Clause in the McCarran Act Requires Application of the 1917 Immigration Act to Petitioner and preserves his Status Thereunder.

The Hearing Officer said: (App. 121)

"The respondent was excludable at the time of his entry under the laws then existing. The Immigration

and Nationality Act makes deportable any alien who was excludable under the law existing at the time of entry, regardless of when the entry took place (Sections 241(a)(1) and 14(c) and 21 is concluded that the respondent is subject to deportation on the first charge set forth in the order to show cause."

The Board of Appeals said (App. 131):

"(a) that the respondent's last entry into the United States was unlawful in that he, an alien, violated the Passport Act of May 22, 1918 and the Executive Order in effect at that time;"

The Hearing Officer said (App. 124):

"* * * the proof presented by the Government has established that the respondent's entry on that date was unlawful and that he was excludable because he did not present a valid passport, and for the further reason that he had been convicted of a crime involving moral turpitude."

The Board of Appeals said (App. 132):

"(b) that the respondent escapee alien who was excludable by law existing on April 16, 1920 on account of that he has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry, to wit voluntary homicide (Section 241(a)(1), Immigration and Nationality Act, supra; Section 3, Act of February 5, 1917, 8 USC 136; 1940 Ed.)."

Judge Perry said (App. 250; hereinafter 8 USC 1101, note):

"Petitioner claims that he cannot be deported because he has acquired a status which is protected by the savings clause of the 1952 Act (8 USC 1101, note)."

This claim was denied by Judge Perry, after quoting from *Lehmann* v. *Carson*, 353 U.S. 685 (App. 250).

The Court of Appeals also cited *Lehmann v. Carson*, 353 U.S. 685 and said, [herein p. 8]:

> "Respondent cannot avail himself of the protection contained in the savings provision of section 405(a)."

Judge Perry said [App. 25a-], herein p. 8[29]:

> "The deportation proceeding under review was brought on the grounds that under the above quoted Section 241(a)(1) petitioner at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry in two respects:
>
> (1) No passport;
>
> (2) Conviction before entry.

In effect, the Administrative Agency, affirmed by the Courts below, has held that petitioner did not have a status under prior legislation which could be preserved by the Act of 1952. There has been omitted from consideration:

(1) Petitioner entered before July 1, 1924 and cannot be deported for illegal entry since there has been an inspection.

(2) Although petitioner might have been excluded in 1920, he could not be deported for illegal entry after 1925.

(3) The judgment entered by Judge Wilkerson to the effect that petitioner had entered legally.

We contend that the term status in the 1952 Act savings clause encompasses and preserves petitioner's non-deportability under prior legislation. In addition, the savings clause speaks of "conditions" and "rights in process of acquisition." The question is whether § 241(a)(1), by specific provisions was intended by Congress to prevent the continuation of the old law, preserved by the savings clause.

We contend that Congress in enacting the Savings Clause did not intend to preserve only rights "in process of acquisition" and cut off rights fully acquired. *Hoon Kwa Sung v. Brownell*, 227 F. 2d 44.

It will be noted that in *United States v. Shaughnessy*, 221 F. 2nd 538, not only that the preliminary application for a visa gave the alien a status, but that the application for visa was eventually denied. The decision made by Judge Clark did not turn on the right of the alien to a visa. The approval of the application by the local immigration officials was enough to give the alien a status. We quote, p. 580:

> "We turn then to the general question of the applicability of 8 U.S.C. (1101 (21) (27) to Zacharias. Did the filing of the petition for issuance of an immigration visa by his American wife give Zacharias 'any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing,' at the time the 1952 Act went into effect? If so, under (403 (a) of that legislation, 8 U.S.C. (1101 note, his case must be governed by prior statutes unless otherwise specifically provided."

History of the Savings Clause

We have placed this history in an Appendix, beginning p. 571.

Please see dissent by Judge Goodrich in *United States v. Smith*, 62 F. 2nd 508, 515, for legislative intent in eliminating the following "ism" proposed in Congress as a ground for deportation:

> "... or obtains entry into the United States by wilfully false or misleading representation or the wilful concealment of a material fact."

The Orders and Judgment entered by Judge Wilkerson in 1928 are res judicata on the very issues relitigated before the Administrative Tribunals.

Some of the pertinent facts may be tabulated as follows:

(1) Petitioner was born in Italy and owed allegiance to the King of Italy.

(2) Sometime, date not shown, petitioner secured a passport from the Italian Government.

(3) Sometime, some place, date and place not shown, petitioner obtained a visa from an American Consul.

(4) Sometime, date not shown, petitioner went from Italy to France.

(5) On August 1, 1920, petitioner sailed from Boulogne, France on the S.S. Ryndam (App. 268).

(6) On August 12, 1920 petitioner arrived at the Port of New York, passed inspection and was admitted for permanent residence.

(7) Sometime after arrival, time and place not shown, the Immigration Officials put the required information about petitioner in a Register, not produced or accounted for. Sometime after arrival the officials, on their own motion, prepared a Certificate of Arrival and sent it to the field office in Chicago, to be used in the event that petitioner filed a Declaration of Intention (App. 174).

(8) After arrival, petitioner took up residence in the United States as a duly admitted alien.

(9) On January 9, 1925, petitioner filed his Declaration of Intention (App. 267) in the Circuit Court of Cook County, Illinois.

(10) On February 21, 1928, petitioner prepared his Preliminary Form for Petition for Naturalization (App. 206) received by the Service in Chicago, Illinois on March 14, 1928.

(11) Sometime after the receipt of this Preliminary Form by the Chicago office, the Preliminary Form was sent to the port where arrival was claimed. The port would verify the arrival. (App. 140).

(12) On April 10, 1928, Examiner Durisch (App. 139) at the office of the Service in Chicago, put petitioner and his witnesses under oath and examined them. It was the usual practice to take the assertions in the Preliminary Form and to question the applicant as to the various items of fact alleged that were needed for the Petition for Naturalization. (App. 141). The Examiner, Mr. Durisch did not remember petitioner or the incident. He identified his handwriting on the Face Brief. (App. 206) The Examiner with the help of a Clerk, prepared the Petition for Naturalization (App. 212).

(13) On April 10, 1928, petitioner's Petition for Naturalization (App. 212) was filed in the District Court.

(14) On April 10, 1928, petitioner appeared before Mr. McKay, a Designated Examiner. Mr. McKay had died before the trial. The Face Brief (App. 206) indicates that Mr. McKay recommended that the Petition be granted. There was no effort made to prove what took place in the way of an examination of petitioner by Mr. McKay, although one of the witnesses who made an affidavit attached to the Petition for Naturalization was called by the Government (App. 138).

(15) Designated Examiner Jordan (App. 167) did not remember petitioner or the particular proceedings, but he identified his notes on the Face Brief (App. 205) and said he accompanied petitioner to court.

(16) On September 27, 1928 Judge Wilkerson entered an order (App. 219), herein p. 863, reciting that upon consideration of the Petition, affidavits and further testimony taken in open Court, admitted petitioner to become a citizen. Ordered also that petitioner's name of Paul Maglio be changed to Paul DeLucia. The Certificate (App. 217) recites that petitioner was then a resident of Chicago, Illinois, and that he had in all respects complied with the Naturalization Laws and was entitled to be admitted. The order recites that petitioner had taken the oath required by law.

(17) In 1956, a Complaint was filed in No. 12003 from which we quote (App. 137):

> "12. That good cause exists for the institution of a suit under Section 340 (a) of the Immigration and Nationality Act, 8 U.S.C. 1451 (a), to set aside and cancel the naturalization * * * on the ground that it was procured by concealment of material facts and by willful misrepresentations."

(18) On June 11, 1957, after a hearing, before Judge LaBuy, the District Court entered a decree, from which we quote (App. 244):

> "* * * the order * * * admitting the respondent * * * to citizenship be and is hereby revoked, set aside and made void, * * * that the Certificate of Naturalization of respondent * * * be and the same is hereby cancelled;"

(19) In an appeal from the above decree petitioner pointed out that (as in *United States v. Strombera*, 227 F. 2d 903, 905):

> "The Nationality Act of 1940 was superseded on December 24, 1952 by the McCarran Act. * * * Section 338 (a) of the Act of 1940 had provided that the order admitting a person to citizenship might be revoked and set aside and the certificate of naturalization cancelled *'on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.'* Section 340 (a) of the McCarran Act changed the grounds to read: *'on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by wilful misrepresentation'.*"

Judge LaBuy in his opinion, herein p. 801, left some doubt as to what the Judge had in mind as ground for cancellation.

We contended if Judge LaBuy cancelled because of lack of the essential prerequisite of legal residence, or on the ground that petitioner had made a false answer about arrests in his Preliminary Petition, that would constitute illegal procurement. That Judge Wilkerson settled those matters. The Court of Appeals said in affirming Judge LaBuy, 256 F. 2d 487, herein p. 819:

> "More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and *fraudulently* procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied to *fraudulently*.)

In holding that the order of naturalization was illegally procured, the Court of Appeals attributed to Judge LaBuy

a jurisdiction removed by Congress. The word *tribunals* interjected by the Court of Appeals still leaves the ground as one of illegal procurement. It was not within the jurisdiction of the Court of Appeals to make this interjection. *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529; *Johnson v. United States*, 256 F. 2d 849; *Parr v. United States*, 363 U.S. 370, 388.

The interjection of fraud is not supported by the record, especially if the record be viewed in the light of *James v. United States*, 366 U.S. 223. This is one ground for our motion under Rule 60 (b).

(20) When we made the point about the change in the law as to illegal procurement before Judge Perry, instead of rejecting that said by the Court of Appeals as an interjection, said, (App. 257) herein p. 838:

> "In this connection it should be observed that in the opinion of the Court of Appeals in the denaturalization case (256 F. 2d 487), Judge Schnackenberg said, at page 491:
>
> > "We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was *illegally and fraudulently procured*, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied by Judge Perry).

Judge Perry disregarded the following which we copy from 5 C.J.S. Attorneys, § 613, p. 39, § 624, p. 50. Among the cases cited are *In re Paquet*, 115 F. 2nd 69; *H. Abraham & Son v. Casola*, 178 U.S. 210; *Kilbreth v. Metropolitan Life Ins. Co.*, 119 F. 2nd 497.

"In order to render a judgment a bar, it is also essential that it be so far specific and definite and free from ambiguity or contradictions as to show clearly what was the claim or cause of action adjudicated . . . nor is the scope of the estoppel to be determined by the reasoning of the court, the substantial effect of the actual decision being the only consideration . . . A judgment affirmed on appeal is final and *res judicata* provided the judgment is of such nature that it would have been final and *res judicata* in the absence of an appeal."

(21) On our appeal from Judge Perry in the case at bar, it was said herein p. 851:

> "The judgment entered in the denaturalization proceeding cancelling respondent's certificate of citizenship nullifies any basis upon which the doctrine of *res judicata* can apply."

We contend that the judgment entered before Judge Watkinson is still in full force and effect as to the finding of legal entry and acquisition of lawful residence.

(22) The Government in its brief, before the Court of Appeals in the case at bar said, p. 16:

> "Moreover, the essential facts in support of the Government's deportation order made below may be upheld before this Court under the doctrine of collateral estoppel. The essential facts sustaining deportation have heretofore been determined in the denaturalization proceeding."

It is not true that the facts supporting the Hearing Officer were determined by Judge Inch. The matter of entry was not litigated before Judge Inch.

(23) This brings us to the question which we now argue.

(a) Does the doctrine of *res judicata* apply in the deportation case because of the Watkinson judgment?

(b) Does the LaBuy doctrine operate as an estoppel in the deportation case?

We note from the cases cited in DIGEST OF THE SUPREME COURT by Wolfson and Kurland-3 310 p. 588, that certiorari is not granted to review evidence, to discuss specific facts, or to give the party defeated in the court below another hearing. With this in mind we still find that considerable detail is necessary in order that necessary points be adequately presented. We trust that Your Honors will agree that the facts must be fully understood and that we have not been influenced too much by our conviction that this record demonstrates that the Tribunals below have failed to comprehend the significance of the points involved.

In the case at bar, we repeat, the Court of Appeals said, herein p. 851:

"The petitioner objected to the denaturalization proceedings on the ground that his certificate of citizenship was issued on the basis of the doctrine of [illegible] can apply.

[illegible]

thing done by petitioner, as if it made void all of the papers filed before Judge Wilkerson and had erased all that found by Judge Wilkerson. We fear that the Court of Appeals had not fully understood our point. If petitioner only had a Certificate of Arrival that would be a different case, but petitioner had pointed to the order entered by Judge Wilkerson establishing his status as a resident alien who had entered legally.

The Court of Appeals said, herein p. 56, that our contention was:

> "that Judge LaBuy made no finding in the denaturalization proceeding that the certificate (of arrival) was improperly obtained; and that, accordingly the admission proceeding pertaining to the certificate stands as a bar to the present deportation. In other words, respondent contends that this constitutes *res judicata* of lawful entry . . . Moreover, a certificate of arrival issued by immigration authorities which is based on records that do not reflect the true facts can in no manner be used to preclude the deportation of an alien who entered the country illegally."

We did not rely upon "admission proceedings". We had pointed to the judgment entered by Judge Wilkerson. The Court of Appeals had no way of knowing, from the record, that the records did not reflect the true facts. The Government never introduced the record on which the Certificate of Arrival was based. For Statute which requires keeping of a Register, the Act of March 3, 1903, c. 1012, § 3, 32 Stat. 1213, 8 U.S.C. (1946 Supp.) 203, 902, amending Act of June 29, 1906, c. 3592, § 34, 34 Stat. 596, 8 U.S.C. (1940 ed.) 220, see *Ex parte Hoshiko*, 270 Fed. 324, 325.

We do have the testimony of Examiner Dixson who said that it was the custom for the officials to send the Preliminary Form to the port where arrival was claimed

and upon the basis of the information in the preliminary Form, the court would make an effort to verify the arrival (App. 140). In an appendix, hereto in part, we have copied the regulations in re a Declaration of Intention, the Preliminary Form and Proof of Residence.

Although the Preliminary Form for Petition for Naturalization (App. 206) does not contain an express plea[illegible] that the Immigration Authorities issue a Certificate of Arrival, anyone reading the testimony of the Examiners Duris (App. 139) and Jordan (App. 167) must know that the officials regarded the Preliminary Form as an application for the privilege of attaching a Certificate of Arrival to a Petition for Naturalization. All of the questions asked in writing of petitioner as to time, place and manner of entry were answered truthfully. The Examiners did not remember petitioner and did not undertake to recall all of the questions asked or the oral answers given. In the absence of evidence to the contrary, should it not be assumed that before delivering the Certificate of Arrival, the officials were in possession of all of the material facts?

In 1925, when the officials decided to allow petitioner to make use of the Certificate of Arrival, they can be charged with the knowledge that we all can now obtain from the various exhibits. They knew the facts reflected on the Certificate of Arrival, herein (p. 56). There has been nothing shown since to contradict those facts. Whether or not petitioner had been arrested in Italy had nothing to do with the fact that he had arrived at the place, time and manner shown on the Certificate of Arrival.

As was said by Judge Goodman in *Corpi v. Bonnicelli*, 147 F. Supp. 517:

> "But in a case of this kind [cancellation of certificate of naturalization as a nullity], a court can not turn back the clock

and wipe out all that was done on the strength of the certificate before it was cancelled."

The question at issue in *Cope* was different than that in the case at bar. But the *Cope* case should remind us that a decree of cancellation does not always make void the legal effect of all of the status once enjoyed.

A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights and questions of law or fact put in issue and adjudicated therein, when the same come again into controversy between the same parties. *Heaman v. Caldwell*, 286 U.S. 494 (1932); *Continental Oil Co. v. Jones*, 170 F. 2d 539 (10th Cir. 1948); *Oklahoma v. Texas Co.*, 156 F. 2d 496 (10th Cir. 1946); *Van Sandt v. Robinson*, 136 F. Supp. 554, 555 (S.D. Cal. 1955); *Restatement, Judgments* § 147 (1942); 30 Am. Jur., Judgments § 283 (1940).

It is well settled that under the doctrine of *res adjudicata* a judgment on the merits in a prior suit bars a second suit between the same parties on the same cause of action, and that under the doctrine of collateral estoppel by judgment there is precluded relitigation of issues actually litigated and determined in a prior suit, regardless as whether it was based on the same cause of action as the second suit. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

In its brief p. 2, the Government took the following position:

> "Appellant's argument of *res adjudicata* and estoppel are purely specious. Determination by immigration officers or even a Board of Special Inquiry are not *res adjudicata*. They do not preclude deportation pro-

readings at the entry is subsequently found to have been unlawful."

Your Honors will perceive that the Government created a man of straw. We did not rely on the determination by the immigration officers at all. This could be disregarded as mere lawyer talk except that the Hearing Officer and the courts below have failed to understand our point. Statements such as the above may have contributed to the confusion.

We quote from *Leonardo v. Haff*, 259 F. 2nd 166, 171, 172:

> "It is the Government's contention that Section 241 (a) of the 1952 Act expressly excepts the charge of deportability for entry without inspection from the application of the 'savings clause' in Section 405(a) as tantamount to an exception in the instant case that the 1952 Act has not been applicable to deportation proceedings the institution of which was [illegible]. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government, the cases cited by the Government are, supposedly [illegible] *See, e.g., Lehmann v. Brownell*, 353 U. S. 685, and *Mahler v. Eby*, 264 U. S. 32. [illegible] *We do not have to reach these difficult questions* [illegible] [emphasis supplied]

In the case at bar there had been a stipulation before Judge Wilkerson, long prior to these deportation proceedings, determining the [illegible] The Court of Appeals was in error in holding that when Judge LaBuy cancelled the Certificate of Naturalization, Judge LaBuy nullified all that had been judicially determined by Judge Wilkerson. It was within the power of

The Court of Appeals has in effect decided contrary to the decision in [illegible] that the judgment entered in the Naturalization case is not res judicata on the subject of entry.

In [illegible] v. [illegible], 263 F. 2nd 166, the Court reversed in a case wherein the District Court (190 F. Supp. 293) dismissed the action of an alien complaining of a deportation order. The question presented was whether the destruction of [illegible] should stop. When Appellant filed his Declaration of Intention he included details as to his arrival here from Italy. There being no record of his entry, an investigation took place, culminating in a deportation order. Appellant secured his discharge in a habeas corpus proceeding. Then a second deportation order was secured. It was held that the second order could not be sustained, because the Government had lost the first case. The fact of entry, as charged by Appellant, had been previously determined. The District Court erred in deciding that the judgment against the habeas corpus did not operate as res judicata with respect to the second order of deportation. In answer to a contention made by the Government that the 1952 Act gave the right to deport, no matter without inspection, Judge Kalodner said, at 171:

> "[illegible] contention rests upon a section of the instant case that the 1952 Act has made [illegible] deportable [illegible] proceedings [illegible] we cannot subscribe to such a construction."

In the case at bar, the previous judgment was entered in the Naturalization proceedings. Attorneys for appellant in *Lagonessa v. United States*, 220 F. Supp. 225, presented the authorities regarding the effect of a decree of naturalization. The legal effect of such a judgment is considered by Judge Wolfenden in *United States*

v. *Laberge*, 189 Fed. 137. In acting upon the petition of petitioner for naturalization in the case at bar, Judge Wilkerson exercised the judicial power conferred by Article III of the Constitution. *Tutun* v. *United States*, 270 U.S. 568; *Schneiderman* v. *United States*, 320 U.S. 118, 123. Petitioner in his first papers gave the facts, as he claimed them to exist, concerning his entry. The Immigration officials, according to the testimony of Darasch (App. 139) and Jordan (App. 167), verified these facts and approved.

The Naturalization Court entered judgment based upon the testimony heard in open court (App. 219), herein p. 863 and also based upon the Declaration of Intention (App. 207) (App. 212) and the Petition for Naturalization which had attached thereto a Certificate of Arrival (App. 212), herein p. 863. It is reasonable to conclude that at the time of decision, Judge Wilkerson knew that the Naturalization Examiners had investigated and had verified the sworn statements made by petitioner, including his statements as to time, place and manner of entry and the fact that he had been a legal resident for eight years. Even if the Designated Examiner had objected to the finding of legal entry and had asserted that petitioner was not a legal resident, Judge Wilkerson had the power to find the findings shown by the record. The Government had a right to appeal, which right was not exercised. The Hearing Officer and the Courts below have failed to observe that the Government has had its day in court on the matter of entry. We must look to the record to determine the questions essential to the decision of the former controversy. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 459. The doctrine of collateral estoppel applies to matters necessarily decided in the former judgment, even if there is no specific finding on reference thereto. *Cromwell* v. *United States*, 354 U.S. 208, 220.

We quote further from *Anselmo v. Hardin* 253 F. 2d 165, 168:

"With the respect to the issue of res judicata these well settled principles are applicable:

(1) A final judgment by a court of competent jurisdiction is *res judicata* as to the parties not only as to all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented, but were not.

(2) Specifically, '*no question of fact or of law distinctly put in issue and directly determined* . . .' cannot afterwards be disputed between the same parties.' *Frank v. Mangum*, 1915, 237 U.S. 309, and where '. . . *the question of priority in time* and right . . . *was directly presented by* the pleadings and evidence and *distinctly dealt with and resolved* in the (prior) opinion' the decree entered pursuant to such opinion is *res judicata* as to the litigated issue. *State of Wyoming v. State of Colorado*, 1923, 286 U.S. 494, 507." (Emphasis supplied by Judge Kalodner.)

(3) The circumstances that the final judgment on the issue raised was premised on the failure of the losing party to support its position by sufficient evidence does not impair the binding effect of the judgment rendered. *Heiser v. Woodruff*, 1946, 327 U.S. 726, 735."

In a footnote Judge Kalodner quotes Mr. Justice Frankfurter in *Lawlor v. Loewe*, 235 U.S. 522, as follows:

"The doctrine of *res judicata* reflects the refusal of law to tolerate a needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties." (Emphasis supplied.)

The Court of Appeals, herein p. 819, said that the proceedings before Judge Wilkerson were not *res judicata* "*of issues presented in the denaturalization proceeding.*".

This brings into focus two questions:

(1) What were the issues presented to Judge Wilkerson?

(2) What were the issues presented to Judge LaBuy?

(a) If (1) and (2) were the same as to time, place and manner of entry, (1) must be accepted as *res judicata*.

(b) If (1) involved time, place and manner of entry and (2) did not, (1) controls and we need not bother with (2).

Before the Hearing Officer, a new problem arose. Did the doctrine of *res judicata* apply in consideration of the judgment entered by Judge Wilkerson as to the issues in the deportation case?

(3) What were the issues before Judge Wilkerson?

(4) What were the issues before the Hearing Officer?

(c) (3) and (4) are the same, so (3) controls under the doctrine of *res judicata*.

In order to properly answer these questions there must be solved three more.

(5) What was the jurisdiction granted by law to Judge Wilkerson on the matter of entry?

(6) What was the jurisdiction granted by law to Judge LaBuy on the matter of entry?

(7) What was the jurisdiction granted by law to the Hearing Officer on the matter of entry?

Your Honors will find that in the Courts below, the legal effect of (5) has been ignored. As to (6), Judge Perry,

was of the erroneous opinion that Judge LaBuy, with the interjection made by the Court of Appeals, had decided on the matter of entry. As to (6), we contend that when Congress changed the law and took illegal procurement as a ground away from the District Court, Congress cancelled any jurisdiction Judge LaBuy might have had under the previous law on the matter of entry. Judge Perry expressed the opinion, herein p. 838, that the McCarran Act saved jurisdiction on illegal procurement. This constituted serious error. *United States v. Stromberg*, 227 F. 2nd 903.

We contend that Judge Perry made errors and that the Court of Appeals fell into the same error. At times the error is more evident in the opinion rendered by Judge Perry. One illustration follows:

We quote from Judge Perry (App. 261) herein p. 842:

> "The Certificate of Arrival in this case was based on data taken from the aforesaid registry, which data, in turn, was based on *misrepresentations willfully made by petitioner to immigration authorities when he entered this country.* Certainly there cannot be attributed to such a certificate a sanctity which was lacking in the records on which it was based.
>
> "It is the view of this court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed, *particularly in view of the findings made by Judge LaBuy in the denaturalization case.*" (Italics supplied)

Here Judge Perry makes the mistake of concluding that petitioner relied upon his Certificate of Arrival as a bar to his deportation. Judge Perry ignored the legal effect of the judgment entered by Judge Wilkerson.

There was no evidence of misrepresentations made to immigration authorities when he entered. The records upon which the Certificate was based were not produced. In-

sofar as the Certificate does reflect the records, the records and the Certificate state the truth. There was no lack of veracity in the records on which the Certificate of Arrival was based. The Certificate of Arrival (App. I, Vol. II, f2093) has been set out in an appendix, hereto, p. 8[illegible].

The exhibits introduced show that this information was correctly stated. When Judge Perry concluded that we had placed reliance entirely upon the Certificate of Arrival, the District Judge misapprehended our point. We quote from our Petition for Review: (App. 10)

> "Judge LaBuy made no finding based upon the charge in the complaint that the Certificate of Arrival was improperly obtained. There was not a line of evidence to show any representation, true, or false, made by petitioner to the officials who did issue the Certificate. . . ."

Your Honors should find that the part of the judgment of the Naturalization Court to the effect that steps necessary as to procedure had been taken should stand undisturbed by the decree entered by Judge LaBuy. Although the Government did not produce the Register, or any records upon which the Certificate of Arrival was based, the Court of Appeals said, herein p. 851:

> "Moreover, a certificate of arrival issued by immigration authorities which is based on records that do not reflect the true facts can in no manner be used to preclude the deportation of an alien who entered the country illegally."

In this one sentence we find two serious errors.

(1) We did not seek to use the Certificate of Arrival separate from the Wilkerson judgment.

(2) The records upon which the Certificate of Arrival was based were not all produced. The exhibits on

respond with the Certificate of Arrival which appears to reflect the true facts."

Here the Court of Appeals falls into the same error made by Judge Perry, as to the evidence, or lack of evidence, before the Hearing Officer. The Government did not produce the records on which the officials acted when they furnished a Certificate of Arrival. As we have pointed out, we did not seek to use the Certificate of Arrival alone to preclude deportation. Our contention is that the judgment entered by Judge Wilkerson precludes litigation again on the matter of entry before the Hearing Officer.

Under the established practice it was not necessary for petitioner to make any representation, true or false, to the Examiners or anyone else, in order to secure a Certificate of Arrival. We quote from the testimony of Mr. Jordan (App. 174):

"Q. When you refer to a Certificate of Arrival, where would that form be created? When would that first originate?

A. At that particular time I believe those certificates of arrival were procured before the Declaration of Intention was filed and were kept in the office with the Naturalization Service in the District field headquarters."

We quote from the testimony of Mr. Dorsch (App. 140):

"The applicant would show his application, which was at that time on a form number 2214, accompanied by the Declaration of Intention, which was quite commonly known as a first paper.

I personally or the applicant by our office, the application was sent to the port where arrival was claimed, and upon the basis of the information in the petition the port would make an effort to verify arrival.

> Upon verifying an arrival, a Certificate of Arrival would be issued and returned with the office papers to the Chicago office.
>
> Then upon receipt of the Certificate of Arrival, the petitioner was called to appear with witnesses at a time and a day and hour was set. When he appeared in our office the examiner would call him."

There was no evidence upon which Judge Perry might conclude that petitioner made any material misrepresentations to the Inspector when he entered the United States. What is more important, there has been no showing anywhere that Judge Wilkerson was told or not told of any misrepresentations made by petitioner concerning entry. Our point is that the Government had an opportunity to contest the veracity of the Certificate and the records of entry, before Judge Wilkerson. Having failed to do so, it is now too late. *United States v. Nechamcus*, 183 Fed. 788; *In Re Jon Gip*, 175 F. 2d 200. *Jacobucci v. Harden*, 253 F. 2d 165.

It should be kept in mind that when Judge Wilkerson considered the evidence to determine if petitioner had acquired a lawful residence, Judge Wilkerson knew that petitioner had been in this country over five years, after having passed inspection at the Port of New York.

It was held in *In Re Pon*, 206 Fed. 4, that the certificate need not be based upon any particular record. We quote:

> "* * * they ought not to be bound to say * * * that while the certificate is genuine and speaks the truth, the Court ought not to give any weight to it because the official did not have proper proof before him."

We quote from one of the cases cited by Judge Kalodner in *Anselmo*, 253 F. 2d 165, 172, *see United States ex rel. Marino v. Shaw*, 76 Fed. 2d 505, 506:

> "She cannot again be lawfully interrogated and held upon the same facts that were in issue in the former proceedings (citations). In the present proceedings it is true it is alleged that the adjudication of the court in Oregon was obtained by the introduction of false testimony, and is tainted with fraud. But such fraud is not a ground upon which to collaterally attack the judgment. *U. S. ex rel. Marino v. Shaw*, 98 U.S. 61."

In the case at bar there was no evidence intended to show that the adjudication by Judge Wilkerson as to entry, the Certificate of Arrival the Declaration of Intention and legal residency was obtained by the introduction of false testimony. All of these had been established before the making of any alleged false answer on the Preliminary Form.

The theory of the Government before Judge LaBuy was that the false answer in the Preliminary form deceived the Examiners and because of such misrepresentation the Government was prevented the Naturalization Petition to go through without contest on the matter of his arrival in Italy. There was no evidence as to the testimony heard by Judge Wilkerson. So there could be no basis for any claim that the Wilkerson judgment was obtained by the introduction of false testimony. There was no evidence to show whether or not the Government was misled by the Petition for Naturalization. Whether or not the Government was misled is now immaterial. The important thing is that the Government was afforded an opportunity to [illegible]

The statute, 8 U.S.C. 1451 authorized Judge LaBuy to set aside the order admitting petitioner to citizenship and Your Honors will perceive the Decree Nisi [illegible] cancelled the Certificate.

The complaint before Judge Dalton included the following (App. 15a—

[illegible]

Your Honors will note that the above [illegible]

[illegible]

The complaint before Judge Dalton [illegible] was made by petitioner in the instant [illegible] App. 20a).

Your Honors will note from petitioner's [illegible] plaint followed the statute [illegible] legal procedure. [illegible]

"... there was not attached to his petition for naturalization a certificate of arrival ..."

the Government proved the opposite and abandoned this charge. As to the allegation that petitioner did

"... hide from the immigration officers at the time of his arrival—"

the Government introduced no evidence and abandoned the charge. We quote from *Yates* v. *United States*, 354 U.S. 298, 335:

"'We agree further that the non existence of a fact may be established by a judgment no less than its existence, that a party may be precluded under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action. *Sealfon* v. *United States*, 332 U.S. 575.'"

If the above two charges had been proved, or if the opinion of Judge LaBuy can be construed to be a finding that these charges were proved, Judge LaBuy exceeded his jurisdiction. The Hearing Officer and the Courts below should have disregarded all that said by Judge LaBuy as to entry. Judge LaBuy said nothing about any Certificate of Arrival. As to the allegation that petitioner did

"... hide ... from the Naturalization Court ..."

the record made before Judge Wilkerson was before Judge LaBuy. It shows [illegible] that Judge Wilkerson took testimony in open court. That testimony has not been preserved, no attempt was made by the Government to prove what evidence was heard. As a legal proposition, the Government was obliged before Judge Wilkerson to prove that which it claims now to show illegal entry or to suffer judgment in the absence of such evidence. The

Government can not be heard at this late day to say that petitioner did hide something from Judge Wilkerson. It is unlawful to impeach that record collaterally on the matter of entry and residence.

Assuming for the purpose of argument that Judge LaBuy had jurisdiction to cancel the finding of Judge Wilkerson, *i.e.*, that petitioner had entered lawfully, that Judge LaBuy could have cancelled the Certificate of Arrival and could have ordered the record upon which this Certificate was based, to be expunged, Judge LaBuy did none of these things. The original judgment entered by Judge Wilkerson is left standing. There was no evidence before Judge LaBuy concerning the entry, further than that shown by the exhibits. Insofar as the exhibits touch upon the time, place and manner of entry, everything had been done to accomplish a routine regular entry after due inspection as required by law.

Before the Hearing Officer, the Government established for the first time in all of this litigation the death of Mr. Beck, the Inspector who evidently passed petitioner. The witness Edward Ferro (App. 90) was not produced before Judge LaBuy, nor was any other witness called to prove anything about entry. The exhibits put in evidence before Judge LaBuy and again before the Hearing Officer, show a legal entry, which evidence was uncontradicted.

In *United States v. Ross*, 171 F.Supp. 651, the Government sought to cancel a citizenship grant. The question considered was the materiality of a false presentation to the American Consul in order to obtain a visa. But, we ask, how can any such question arise to be answered in the case at bar in the absence of evidence of what took place before the American Consul? Evidence still in the possession of the Government? See also *In Re Faibik Petition*, 159 F.Supp. 144. In *Vergette Torres v. Hoy*, 262 F. 2nd 289, the same question was answered in favor of deportation.

but please note that the Government proved the answers given by the alien to questions put to her in her application for a visa. Further there was proof that these answers were false. In *Calvillo* v. *Robinson*, 271 F. 2nd 249, the question of materiality was answered in favor of the alien. Please note again that the Government proved and it was conceded that the application for a visa had contained wilful misrepresentation of a fact. Please note that in *Duran-Garcia* v. *Neelly*, 246 F. 2nd 287, the alien admitted the commission of perjury in obtaining her visa. Again in *Herrera-Roca* v. *Barber*, 150 F.Supp. 492, the Government proved the questions and answers as they took place before the American Consul. In *United States* v. *Morris*, 27 F.Supp. 153, the alien made a false statement as to former residence to the American Consul in order to secure his visa. In *Landon* v. *Clarke*, 239 F. 2nd 631, the alien admitted the making of false statements to the American Consul in order to obtain a visa. The Court pointed to specific provisions of the McCarran Act to warrant her deportation. 8 U.S.C.A. § 1251(a)(1), 1182(a)(20). In *Lenghammer* v. *Hamilton*, 295 F. 2nd 642 the alien admitted the making of false answers in order to obtain a visa. Judge LaBuy did not choose to base the decree on illegal entry. Our point is that the Government did have to put the entry into issue by the complaint (¶ 3(b), App. 135) before Judge LaBuy and then elected to not follow up with any further evidence than that shown and which disclosed a legal entry.

We repeat from a quotation above taken from the opinion rendered by Judge Perry (App. 202) herein, p. 8:

> "It is the view of this Court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed. [Emphasis in text of the Judge as made by Judge LaBuy in the deportation case.]" (Italics Supplied)

It would be more accurate to say that we contend that the Hearing Officer failed to heed the legal effect of the judgment and findings made by Judge Wilkerson, concerning the entry of petitioner.

Judge Perry did not choose to be more specific as to the findings believed by Judge Perry to have been made by Judge LaBuy. We fear that Judge Perry misapprehended those findings and concluded that Judge LaBuy had decided that the entry was unlawful. Judge LaBuy did not base his decree on any such finding. We quote from the opinion of Judge LaBuy, 163 F. Supp. 36, 41; herein p. 812:

> "The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him."

Judge LaBuy had just made it clear that reference was made to a failure on the part of petitioner to disclose to the Examiners all the facts in the matter of a previous arrest. The question litigated before Judge LaBuy was whether or not petitioner had failed to fully and truthfully answer the questions put to him by Pursell (App. 139) Jordan (App. 167) and McKay, checking on the Preliminary Form (App. 206) requesting information about a previous arrest. There was no evidence before Judge LaBuy concerning entry, other than that shown in the various exhibits. The question as to whether petitioner concealed or misrepresented any fact to the Inspector at the time of entry was not litigated before Judge LaBuy. Judge LaBuy did say, 163 F. Supp. 36, 40; herein p. 812, that the use of an assumed name to gain entry had been held to be sufficient for revocation.

This was dictum. The cases cited by Judge LaBuy at this point do not contradict the legal principles contended for here by petitioner. Your Honors will observe that this about entry was said by Judge LaBuy in passing, in the statement of the case.

Mr. Justice Sanford said in *Oklahoma* v. *Texas*, 272 U.S. 21, 52:

> "The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but on an examination of the issues made and intended to be submitted, and which it was intended to decide."

See also *Vicksburg* v. *Henson*, 231 U.S. 259. There is no finding made by Judge LaBuy concerning the entry of petitioner. The writer of the headnotes made no reference to the matter of entry. The Court of Appeals said, affirming Judge LaBuy, 256 F. 2d 487, 490; herein p. 818:

> "(4) The use by an alien of an assumed name to gain entry into the United States is ground for deportation, *London* v. *Clarke*, 229 F. 2nd 631, unless satisfactorily explained. *Leibowitz* v. *Schlotfeldt*, 94 F. 2d. 263."

The above (4) will be recognized by Your Honors as dictum on the part of the Court of Appeals in the denaturalization case, but did the Hearing Officer so recognize it? Did Judge Perry recognize it? Petitioner has reason from this record to fear that the above was regarded as an adjudication applicable in the case at bar as against petitioner. At the time of the above statement (4) by the Court of Appeals was made no deportation case had been instituted by the Government.

In *Morand Bros. Beverage Co.* v. *N.L.R.B.*, 204 F. 2nd 529, Judge Lindley made reference to the duty of a

reviewing court to not enter initial findings of fact. Also see *Johnson* v. *United States*, 256 F. 2nd 849. In *Parr* v. *United States*, 363 U.S. 370, 388. Your Honors noted that a certain theory was first interjected into the case by the Court of Appeals and not supported by the record. No such fact or theory as the one interjected was charged in the indictment, shown by the evidence or submitted to the jury in the *Parr* case.

We call attention to the judgment entered by Judge Wilkerson (App. 219) herein p. 863 and Certificate of Naturalization (App. 216) as a starting point from which to review the order of deportation. We respectfully represent that under the law, the judgment of naturalization constitutes a final determination of issues of fact, the establishment of which Congress made conditions precedent to naturalization. *Chicot County Dist.* v. *Bank*, 308 U.S. 371, 378; *United States* v. *Throckmorton*, 98 U.S. 61; *United States* v. *Richmond*, 17 F. 2nd 28.

Mr. Justice Douglas in *Knauer* v. *United States*, 328 U.S. 654, 670, distinguished *United States* v. *Throckmorton*, 98 U.S. 61 and *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 421, from which the following appears:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact; the establishment of naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category."

Your Honors do not have a communist case. There has been no suggestion to date that petitioner did not take the oath of allegiance in good faith. It becomes necessary to consider the extent to which the original proceedings in the Naturalization Court may constitute a final determination of issues of fact. Those facts relating to the past to

behavior and conduct. See *Klig* v. *United States*, 296 F. 2nd 343; *Chaunt* v. *United States*, 364 U.S. 350; *United States* v. *Tooma*, 187 F.Supp. 928.

Mr. Justice Brandeis in *United States* v. *Ness*, 245 U.S. 319, 324, said:

> "Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. * * * Naturalization granted without the certificate having been filed, is, therefore 'illegally procured': *United States* v. *Ginsberg*, 243 U.S. 472; and it may, at least where proceedings were ex parte, be set aside under §15."

At the time of the decision of the *Ness* case, citizenship could be revoked because of the failure to file a Certificate of Arrival. When Judge LaBuy heard the case relative to petitioner that jurisdiction had been removed by Congress. *United States* v. *Minevich*, 250 F. 2d 721, *United States* v. *Strongberg*, 227 F. 2nd 903. In *Johannessen* v. *United States*, 225 U.S. 227, 236, it was held that Congress might authorize a direct attack upon a certificate of citizenship. It must follow that, after some years of experience with a provision for cancellation on the ground of illegal procurement, Congress also had the power to cut down and curtail the authority previously granted.

Judge Wilkerson was not required to depend entirely on the Certificate of Arrival in order to find legal entry. The production of a Certificate of Arrival does not automatically obligate the naturalization court to hold that the entry was lawful and for the purpose stated. In *In Re Barron*, 26 F. 2nd 106, Judge Tuttle denied a petition for citizenship without prejudice, on the ground that although Barron presented a Certificate of Arrival showing entry for permanent legal residence in 1917, the evidence did not show actual residence until 1925, a shorter period than required by law.

We quote, p. 107:

> "The court is not bound by the recital of facts contained in the certificate of arrival. The facts shown on the certificate of arrival are to be taken into consideration, along with all the other facts and circumstances, in determining his actual intention and legal residence."

In the case at bar Your Honors must assume that Judge Wilkerson understood the law to be that petitioner was not entitled to be admitted to citizenship unless petitioner had become a lawful resident. Judge Wilkerson found explicitly that petitioner was a resident of Chicago and that he had in all respects complied with the Naturalization Laws. (App. 226; hereon p. 864. Judge Wilkerson had the power to find petitioner to be a lawful resident. In the absence of a record of the testimony heard by Judge Wilkerson, nobody can know the actual basis of this decision. All we know for sure is that Judge Wilkerson was satisfied with the evidence submitted. There appears an annotation in 22 A. L. R. 2nd 284, headed

What constitutes showing of good moral character on the part of an applicant for naturalization.

We quote pp. 292, 293:

> "There is a clear-cut conflict of authority as to the propriety of the court's consideration a petitioner's conduct prior to the five-year statutory period immediately preceding the filing of his petition for naturalization.
>
> Some courts consider that the petitioner's behavior during the entire time he had been in the United States is material and is properly introduced as evidence of his character.
>
> But other decisions recognize that commission of a felony, even if it involves moral turpitude, does

not impose a permanent disability and that the petitioner may thereafter reform and show good moral character so as to be eligible under the statute."

We quote from *United States* v. *Profact*, 274 F. 2nd 289, 292:

"Since good moral character during the prescribed five year period in this country was the sole test of good moral character, *Daddona* v. *United States*, 2 Cir., 170 F. 2nd 964; *Petition of Zele*, 2 Cir., 127 F. 2d 578, Id., 2 Cir. 140 F. 2d 773; *Application of Murrà*, 7 Cir., 178 F. 2d 670, and naturalization could not be denied on account of arrests prior to the five years of residence in the United States, it could honestly have been thought that the examiner was not interested in earlier, foreign, arrests."

In *In Re Bistpatou*, 100 F. Supp. 44, Judge Gourley admitted an alien to citizenship in spite of a previous conviction for voluntary manslaughter. The court looked into the facts relating to the killing. In the consideration of our claim of *res judicata*, Your Honors might conclude that when Judge Wilkerson found petitioner to have been of good character, Judge Wilkerson took into consideration any trouble in Italy or decided that such trouble was immaterial. In either event, the Hearing Officer was not free to again litigate the matter.

In *In Re Fanariotis*, 33 F. 2nd 313, the Government questioned the formal sufficiency of the Certificate of Arrival on the ground that it did not disclose the inspection, registry and payment of tax required. It was held to comply, p. 314:

"The statute requires only a certificate from the Department of Labor * * * stating the date, place and manner of his (the petitioner's) arrival in the United States."

Your Honors will notice the use of the expression "manner of arrival", used also on the Certificate of Arrival, herein p. 863. The "manner of arrival" question was answered by the name of the steamship Ryndam. So we conclude that "manner of arrival" as used here and in Section 291, calls for an answer as to the mode of transportation, steamship or railroad.

We quote from *In Re Pezzi*, 29 F. 2d 999, 1001:

> "In order to be entitled to naturalization, an alien must establish lawful entry into the United States as an immigrant with intent to remain in the United States permanently."

The Courts below have ignored the fact that petitioner must have established lawful entry as an immigrant with intent to remain and that Judge Wilkerson found that he had acquired that status in 1928.

We quote from *Tutun* v. *United States*, 270 U.S. 568, 578:

> "The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfilment of all conditions upon the existence of which the alleged right is made dependent; and he must estabish these allegations by competent evidence to the satisfaction of the court."

In re Vasicek, 271 Fed. 326, illustrates the rule that the burden rests on a petitioner for naturalization affirmatively to establish that he has fully met the requirements of the statute. Judge Dwyer has gathered the authorities relating to the various steps. We quote from *Petition of Lango*, 21 F. 2nd 968:

> "Under the law, it seems apparent that a declaration of intention can be made legally by an alien only when he is legally a resident of the United States."

The order of court (App. 219) admitting petitioner to citizenship herein p. 863 recites that the petition and affidavit were considered in support, together with further testimony taken in open court. The judgment (App. 217) herein p. 864 recites that

> • • • the court having found that the petitioner intends to reside permanently in the United States and that he has in all respects complied with the Naturalization Laws. • • •

Your Honors will note that Judge Wilkerson found as to petitioner

(a) His name was Paul DeLucia. On the reverse side of the Certificate there appears the following (App. 218),

> "By order of Court, name changed from Paul Maglio".

(b) then, in 1928, petitioner was a resident of Chicago (App. 217).

(c) petitioner had in all respects complied with the Naturalization laws. (App. 217).

Your Honors know, as to (b) that petitioner could not have been a resident if he had entered illegally. Judge Wilkerson may have found that the matter of entry was immaterial because petitioner had entered in 1920, before 1924, and more than five years had elapsed. As to (c), petitioner could not have complied with the Naturalization laws without a Declaration of Intention. Judge Wilkerson found that the Declaration of Intention (App. 267) was made legally while petitioner was a resident of the United States.

As was said in *Petition of Connal*, 8 F. 2nd 374, 375, it was not the intention of Congress to allow any alien, regardless of how he may have come into the country to

become a citizen, therefore a declaration of intention not made by a resident was invalid. *United States* v. *Kreticos*, 40 F. 2nd 1020.

The power was conferred on the District Court and the duty was imposed on Judge Wilkerson to adjudge whether or not petitioner should be admitted on the evidence which proved the date, place and manner of petitioner's arrival, his possession of the essential qualifications to entitle him to admission as a citizen, including residence and legal entry.

Your Honors have no way of knowing just what that evidence might have been, through no fault of petitioner. Judge Wilkerson approved of and accepted the evidence including the Declaration of Intention and the Petition for Naturalization, and admitted petitioner to citizenship. When the Hearing Officer decided that petitioner had entered illegally, that official failed to give the required legal effect to the judgment entered by Judge Wikerson. It appears that Judge Perry (App. 262), herein p. 843, was under the mistaken opinion that Judge LaBuy had found the entry to have been illegal.

We submit that if Judge LaBuy had cancelled because of illegal entry that would have been for illegal procurement. Judge LaBuy had no jurisdiction to cancel for illegal procurement. *United States* v. *Strombery*, 227 F. 2nd 903. Even if Judge LaBuy did have jurisdiction of a charge of illegal procurement, no such charge is in the Complaint. (App. 133).

We quote from *Schneiderman* v. *United States*, 320 U.S. 118, 160:

> "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Con-

sequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

What was involved before Judge LaBuy and there determined is to be tested by an examination of the record, including the pleadings, the evidence submitted and the respective contentions of the parties. *Cities Service Co.* v. *Securities and Exchange Comm.*, 257 F. 2nd 926, 930. Judgments must be interpreted in the light of pleadings. *Caprito* v. *United States*, 217 F. 2d 783. The Government, before Judge LaBuy, could not recover upon a cause of action different than that upon which the complaint was based. *Rosenfeld* v. *Lion Manufacturing Corp.*, 253 F. 2nd 90.

To sum up:

(a) This deportation case and the previous denaturalization case before Judge LaBuy are two different suits between the same parties.

(b) An inquiry must be made as to whether the allegation of unlawful entry, made before Judge LaBuy, was actually litigated and determined, not what might have been litigated and determined.

(c) Only upon matters actually litigated and determined is the judgment before Judge LaBuy to be regarded as an estoppel as against petitioner.

We quote from *Larsen* v. *Northland Trans. Co.*, 292, U.S. 20, 25:

"The established rule in this Court is that in a second action between the same parties, a claim different from one sued upon in a prior action is presented, then the judgment in the former case is an estoppel 'only as to those matters in issue or points controverted upon which the finding or verdict was rendered.'"

As was said in *Cromwell* v. *County of Sac.*, 94 U.S. 351, 356:

> "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

We quote further from *Larsen* v. *Northland Trans. Co.*, 292 U.S. 20, 25:

> "While a defendant must bring forward all purely defensive matter, he is not barred by a former judgment against him as to any matter which he was not bound to present and which was in fact not litigated. 'A judgment is not conclusive of those matters as to which a party had the option to but did not put in litigation in the action.' Freeman on Judgments 5th ed. §786."

After Your Honors correctly appraise the legal effect of the judgment by Judge LaBuy the authorities indicate alternatives as follows:

(a) Judge LaBuy had no jurisdiction and left the judgment by Judge Wilkerson stand as to lawful entry and required residence. The specific finding that petitioner had lawfully entered the United States, made by Judge Wilkerson, is res judicata against the Government in this deportation proceeding. If Judge LaBuy had no jurisdiction it makes no difference what Judge LaBuy may have said about entry and required residence.

(b) Judge LaBuy had jurisdiction to look into the matter of entry. But the Complaint (App. 133) did not charge illegal procurement. Then in the presentation of evidence before Judge LaBuy, the Government abandoned illegal entry and proved a legal entry. This fact therefore may not be again litigated and the Government is estopped.

We quote from *Semmes* v. *United States*, 91 U.S. 21, 27, 1 Otto 21, as quoted in *People* v. *Sbarbaro*, 386 Ill. 581, 592:

> "• • • as it is settled law that a judgment may be good in part, and bad in part—good to the extent it is authorized by law, and bad as to the residue."

The judgment entered by Judge Wilkerson may be good in part and have been vacated in part leaving some of it to stand. The part of the judgment by Judge Wilkerson which is good and left standing is that petitioner entered legally and established residence.

The judgment or decree entered by Judge LaBuy, even if the opinion be considered part of the decree, which we dispute, may be good in part and bad in part.

The Decree (App. 244) revokes the order admitting petitioner to citizenship and cancels his Certificate. The Decree contains nothing about entry or legal residence in the United States as established by the Wilkerson judgment. If the judgment entered by Judge LaBuy is now to be regarded as a revocation of the entire Wilkerson judgment as was held by the Court of Appeals in the case at bar we ask for application of the rule that part of the LaBuy judgment is void as beyond the power of Judge LaBuy. *United States* v. *Walker*, 109 U.S. 258; *Verbeem* v. *United States*, 154 F. Supp. 431 435; *In Re Denney*, 47 F. Supp. 36. *United States* v. *Stromberg*, 227 F. 2nd 903. In the construction of the judgment entered by Judge LaBuy we ask Your Honors to conclude that Judge LaBuy had no power to enter a judgment void because of limitation of jurisdiction, or improper because of the nature of the pleadings and the evidence. A judgment void on its face is in legal effect no judgment and does not constitute res judicata. *Jackson* v. *Vance*, 179 F. 2nd 154, 158. As was said in *In Re Mercer Irr. District*, 25 F.Supp. 981, 987, affirmed 114 F. 2nd 654:

> "The sole basis for judicial action is law and if there be none • • • the assumed court action is a nullity and neither confers or withdraws rights."

The judgment entered by Judge Wilkerson might be regarded as a voidable judgment. By authority of Congress, Judge LaBuy was granted a limited jurisdiction to void the previous judgment. Until set aside, a voidable judgment is not subject to collateral attack. 49 C.J.S. JUDGMENTS, §449 p. 880. We quote from *Briscoe* v. *Dist. of Columbia*, 221 U.S. 547, 553:

> "There is no possible ground for upholding the present collateral attack if the order was voidable only."

In affirming Judge LaBuy, the Court of Appeals recognized that Judge LaBuy had not made it clear as to what petitioner had concealed, 256 F. 2nd 487, 490, herein p. 818:

> • • • the court had in mind DeLucia's failure to reveal his convictions • • •

When Judge LaBuy and the Court of Appeals used the plural, "homicides", they included a conviction in 1924, entered in the absence of the defendant therein named (Ex. 38, App. 229). There is no evidence that petitioner even knew of the conviction when he was naturalized.

The Court of Appeals said, p. 490, herein p. 817:

> "The court stated as a conclusion that DeLucia had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the naturalization office."

It is important now to keep in mind that Judge LaBuy and the Court of Appeals were called upon to decide on an issue

only as to alleged failure and misrepresentation, which took place eight years after entry. Neither the Hearing Officer nor Judge Perry had any right in the construction of the LaBuy judgment to add new provisions, omitted in the first instance. *Butler* v. *Denton*, 150 F. 2nd 687, 690.

Of course the questions printed in the forms could have requested details in such manner as to require petitioner to either admit or conceal the fact that when he entered he might have been excluded if a Board of Special Inquiry had been called. But there were no such questions. See dissent by Mr. Justice Douglas in *Costello* v. *United States*, 365 U.S. 265, 288.

Perhaps one reason for the absence of more printed questions on the forms in use in 1928 was that an alien who had passed inspection in 1920 was not excludable after he had become a resident.

In *Johannessen* v. *United States*, 225 U.S. 227, 242, it was said:

> "The Act makes nothing fraudulent or unlawful that was honest and lawful when done."

In *Tutun* v. *United States*, 270 U.S. 568, 579, the Government argued that §15, providing for cancellation, constituted a provision for review. This contention suggests that Judge LaBuy was authorized to review the judgment entered by Judge Wilkerson. We quote from 5 B, C.J.S. APPEAL & ERROR, §1951, p. 514:

> "An order, judgment, or proceeding dependent on or ancillary and accessory to, a judgment, order or decree which is reversed shares its fate and falls with it. This rule, however, will not operate, by implication to set aside a distinct and independent judgment or proceeding, although it forms a part of the same litigation, and it is sometimes held that the proceed-

> ings in the lower court previous to and not infected by, the error for which the judgment is reversed are not vacated thereby."

There can be no doubt that the judgment of Judge Wilkerson that petitioner had acquired legal residence was a judgment required as ancillary. The concealment or misrepresentation for which the judgment was vacated occurred eight years after entry.

The alleged concealment or misrepresentation occurred three years after petitioner had acquired legal residence. All the investigation possible to be made after the alleged false answer was made on the Preliminary Form (App. 206) in 1928 and before the Petition for Naturalization came on for hearing (App. 212) could not have developed any fact to show that petitioner had not acquired a legal residence and a status of non-deportability.

Even if an investigation developed all of the circumstances placed before the Hearing Officer and it could have been presented to Judge Wilkerson in 1928 by the Government, in opposition to petitioner's application for citizenship, Judge Wilkerson may have found that petitioner had acquired a residence in the United States. Judge Wilkerson may also have found, after considering all of the evidence now before the Administrative Agency, that petitioner was of good character and entitled to be admitted to citizenship. Petitioner must be judged by the law as it existed in 1928, not as it is today under the McCarran Act, as to what was material in 1928. Cf. *James v. United States*, 366 U.S. 213, 223. In 1928, a false answer as to an arrest was not material on the matter of entry and the acquisition of residence and a status of nondeportability. Even if Congress had the power to take away the status retroactively Congress could not turn back the clock and make an answer material in 1952 which was not material in 1928.

Mr. Justice Brandeis said in *Tutun* v. *United States*, 270 U.S. 568, 579:

> "The remedy afforded to the Government by §15 is narrower in scope than the review commonly afforded by appellate courts."

In the *Tutun* case, an action such as that before Judge LaBuy was referred to as "a bill in equity to cancel certificate of citizenship." We quote from 30 C.J.S. EQUITY, §612, p. 1010:

> "A single decree may have the effect of several separate decrees."

Citing *Hoier* v. *Kaplan*, 313 Ill. 448, 145 N.E. 243; *Walker* v. *Montgomery*, 236 Ill. 244, 86 N.E. 240. A decree must be construed with reference to the issues it was meant to decide. *Vicksburg* v. *Henderson*, 231 U.S. 259; *Oklahoma* v. *Texas*, 272 U.S. 21.

It becomes necessary to again study the opinion by Judge LaBuy, from which we quote, 163 Supp. 36, 37, 38, herein pp. 802, 804:

(a) "The first basic issue which the government must prove is that this defendant, Paul DeLucia, is the same Paul DeLucia who was granted a Certificate of Naturalization in September 1928.

(b) The next basic issue which the Government must prove is that this defendant falsely assumed the name of Paul Maglio *when he applied for his naturalization.*" (Italics supplied.)

We have copied all that Judge LaBuy designated as having been placed in issue before him.

(a) There was no dispute as to this fact.

(b) It will be noted that Judge LaBuy expressly limited the issue to the application for naturalization.

Judge LaBuy said nothing about any issue having been presented concerning entry.

> "A judgment is not conclusive on matters which were beyond the jurisdiction of the court or by reason of the nature of the case could not have been adjudicated." 50 C.J.S. Judgments §731, p. 222.

The complaint before Judge LaBuy alleged that naturalization was procured by concealment of material facts by willful misrepresentation (App. 136). This follows the language of §340 (a). *United States* v. *Minnerich*, 250 F. 2nd 721, 730, indicates that cancellation because of illegal entry would have been illegal procurement. Judge LaBuy had no jurisdiction to cancel for illegal procurement. In *Minnerich*, Judge Finnegan quoted the previous statute and held that the amendment indicated a shift by Congress from a broad ground to a ground more restricted. New legislation is to be construed in the setting of existing law and practice. *Bindczyk* v. *Finucane*, 342 U.S. 76, 93, dissent by Mr. Justice Reed, from which we quote:

> "Even the most comprehensive legislation cannot be considered as though it were the entire body of the law. The continuation of courts and practices is assumed."

Judge Finnegan said that there is a delusive exactness about the words "concealment" and "material fact". On what constitutes concealment of a material fact or wilful misrepresentation see annotation 5 L. ed. 2nd 120 United States Supreme Court Reports.

We respectfully suggest close study of the opinion of Judge Hall in *United States* v. *Kusche*, 56 F. Supp. 201. It was held under the previous statute that a judgment of naturalization was not res judicata if cancelled for "illegal procurement." Judge Hall made an examination of the authorities, in order to determine what was meant by Congress

by the term "illegal procurement." It must be assumed that Congress knew the law as it existed before this change and deliberately took away much of the jurisdiction previously afforded the District Courts. Mr. Justice Black in *James* v. *United States*, 366 U.S. 213, 231, made note that when Congress is dissatisfied with a decision it can and frequently does act to overturn it. Congress must have been dissatisfied with the result of legislation which required decisions like *Maney* v. *United States*, 278 U.S. 17.

In *Costello* v. *United States*, 365 U.S. 265, Your Honors were considering misrepresentations alleged to have been made concerning the five years of residence. Materiality was plainly demonstrated. In *Polites* v. *United States*, 364 U.S. 426, 430, Mr. Justice Stewart added this footnote:

> "The court also found that the petitioner had procured his citizenship fraudulently. The respondent now states that it does 'not now rely upon the fraud finding as an alternative basis for the judgment of denaturalization.' In the light of its concession that, 'in view of the state of this particular record,' the finding of fraud was not supported by sufficient evidence, we proceed upon that premise."

It is our contention that Judge LaBuy had no jurisdiction to cancel on any ground but concealment of material facts or misrepresentation. It is obvious that the concealment or misrepresentation must have been accomplished before Judge Wilkerson or in the proceedings before the Naturalization officials. Concealment or misrepresentation at the port of entry would be a horse of a different color.

After Your Honors study the table prepared by Judge Hall in *United States* v. *Kusche*, 56 F. Supp. 201, 210, it may be possible to ascertain what was intended by Congress when Congress eliminated "illegal procurement" from the jurisdiction of Judge LaBuy. Judge Hall has

listed *United States* v. *Parisi*, 24 F. Supp. 414, as a case which amounts to illegal procurement alone. The misrepresentation of the alien was as to a basic statutory condition respecting his lawful entry. Congress took jurisdiction from Judge LaBuy, if it be determined here that the case at bar resembles *Parisi* and the naturalization was illegally procured by petitioner. Your Honors will notice from *United States* v. *Stromberg*, 227 F. 2nd 903, that the Government sought to denaturalize Stromberg on the ground that because a conviction prior to entry he could not have lawfully resided in the United States. It was held that such ground would be illegal procurement, over which the District Court had no jurisdiction under the McCarran Act.

We quote from *United States* v. *DeLucia*, 256 F. 2nd 487, 490, herein p. 818:

> "While the Court did not expressly indicate what is meant by the words 'the concealment of other material facts' * * *"

In other words, the Court of Appeals found some difficulty in ascertaining from the opinion of Judge LaBuy just what Judge LaBuy had in mind and intended as a basis for the Decree (App. 244). We quote from *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F. 2nd 304, 310:

> "If the precise question here involved was raised and determined adversely to appellant in that suit, it would operate as an estoppel by judgment in the present suit. But if the judgment in the former suit could be based on an issue not involved in the later suit and it is not made to appear on which of the several issues the judgment was based, estoppel by judgment does not arise."

We quote from 50 C.J.S. JUDGMENTS, §§613, 624, pp. 36-50, citing *In Re Power*, 115 F. 2d 69; *Abraham* v. *Casey*,

179 U.S. 210, and *Kithcart* v. *Metropolitan Life Ins. Co.*, 119 F. 2nd 497:

> "In order to render a judgment a bar, it is also essential that it be so far specific and definite and free from ambiguity or contradictions as to show clearly what was the claim or cause of action adjudicated * * * nor is the scope of the estoppel to be determined by the reasoning of the court, the substantial effect of the actual decision being the only consideration * * * A judgment affirmed on appeal is final and res judicata provided the judgment is of such nature that it would have been final and res judicata in the absence of an appeal."

All of this brings us back to another appraisal of the opinion rendered by Judge LaBuy. We respectfully suggest that Your Honors start with a study of the decree (App. 244). Only the Certificate of Naturalization has been cancelled. Nothing about entry or required residence. Under F.R.C.P. 52(a) and 54(A) findings are not part of the decree. *Wabash Corp.* v. *Ross Electric Corp.*, 187 F. 2d 577, 592.

As was said in *De Sollar* v. *Hanscombe*, 158 U.S. 216, 227, quoting from *Russell* v. *Place*, 94 U.S. 606, 608:

> "Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment."

The precise fact decided by Judge LaBuy, if we keep in mind the limitation placed upon Judge LaBuy by the complaint and the evidence, is that petitioner misrepresented and falsified about a material fact. We ask—material about what? Cf. *United States* v. *Profaci*, 274 F. 2nd 289. The only answer held to be false was about an arrest. The Court of Appeals construed the opinion of Judge LaBuy to mean, p. 490:

> "DeLucia's failure to reveal his convictions for homicides in Italy * * *"

This failure took place eight years after entry. The determination of issues actually litigated is conclusive. *Cities Service Co. v. Securities and Exchange Comm.*, 257 F. 2d 926, 930. Now Your Honors are respectfully requested to determine if the precise fact determined had anything to do with entry.

We repeat the above quote from the Court of Appeals p. 490, herein p. 818:

> "DeLucia's failure to reveal his convictions for homicides in Italy * * *"

A re-examination of the records, including the opinion by Judge LaBuy, must compel Your Honors now to perceive that the "failure to reveal" must mean failure to reveal to the Naturalization Examiners. Judge Perry in answer to our point said; (App. 260), herein p. 841:

> "* * * he perpetrated a fraud on the government in obtaining his immigration visa."

There is no evidence to support such conclusion. The "failure to reveal" can not legally be extended from failure to reveal to Examiners to "failure to reveal" to the American Consal and the inspectors at the port of entry.

In other words, the issue decided before Judge LaBuy is different than the issue decided before the Hearing Officer. The issue as to entry was the same before Judge Wilkerson as before the Hearing Officer.

See *Davis v. McKinnon & Mooney*, 266 F. 2nd 870, 872 for a statement of the fundamental principle of jurisprudence concerning facts settled by judgment in a previous action.

We contend that these findings made by Judge Wilkerson as to legal entry and residence act as a bar, under the law of res judicata. Res judicata usually concerns itself with evidentiary or intermediate facts determined in the

prior litigation. *United States* v. *Carlisi*, 32 F. Supp. 479, 482.

The Government is bound by the Judgment entered by Judge Wilkerson and can not escape its effects by producing new argument or new evidence in a subsequent action (these deportation proceedings) in support of the proposition decided against it before Judge Wilkerson. *Tait* v. *Western Maryland Railway Co.*, 62 F. 2d 933, affirmed, 289 U.S. 620. Ignorance or mistake concerning the facts at the time of the Wilkerson finding could not be of help to the Government. *Guettel* v. *United States*, 95 F. 2d 229.

The intent of Congress is often immaterial on fundamental principles of jurisprudence concerning the law applicable to judgments. We quote from 50 C.J.S. JUDGMENTS, §613, p. 36:

> "The question whether the rules of res judicata should be applied to a particular decision is from its nature a question of law and does not rest in the discretion of the court."

It must follow that a Hearing Officer has no discretion, nor did Judge Perry.

The importance of a determination of the precise issues litigated before Judge LaBuy might be pointed up if Your Honors will consider the following quoted from 50 C.J.S. §597, p. 15:

> "A party who is entitled to claim the benefit of a former judgment may waive, or be estopped to assert the right."

Included in the cases cited as are *Murrell* v. *Stock Growers*, 74 F. 2d 827; *Donald* v. *White*, 68 F. 2d 441; *Hickox* v. *Johnson*, 9 F. 2d 498; *Uranium Co.* v. *Benton*, 149 F. Supp. 667; *Syms* v. *McRitchie*, 187 F. 2d 915; *Seagram Distillers Corp.* v. *New Cut Rate Liquors*, 245 F. 2d 453.

We quote further from §507:

> "Somewhere a party * * * joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it * * * he will be held to have waived the benefit of the estoppel and the case may be determined as though no such former judgment had been rendered."

So, assuming for the sake of argument that Judge LaBuy made null and void the entire proceedings before Judge Wilkerson and the decree entered by Judge LaBuy estopped petitioner from litigating the subject of entry, the Government waived the benefit of that estoppel by opening the matter again before the Hearing Officer.

In its brief to the Court of Appeals on our appeal from Judge LaBuy, the Government included the following p. 3:

> "Congressional bar makes inapplicable to these proceedings the doctrine of *res judicata*; or are estoppel and *laches* applicable to the Government in these proceedings."

Authorities were cited including *Johannessen* v. *United States*, 225 U.S. 227; *Maney* v. *United States*, 278 U.S. 17; *Luria* v. *United States*, 231 U.S. 9; *United States* v. *Ness*, 245 U.S. 319; *United States* v. *Ginsberg*, 243 U.S. 472; *United States* v. *Siegel*, 2 Cir. 1945, 152 F. 2d 614, cert. den. 328 U.S. 868; *United States* v. *Hauck*, 2 Cir. 1946, 155 F. 2d 141; *Knauer* v. *United States*, 328 U.S. 654, 673; all decided before Congress changed the law as to denaturalization as appears in *United States* v. *Stromberg*, 227 F. 2d 903. We respectfully ask that Your Honors reconsider the authority of *Johannessen et al* in the light of the new statute. The Government asserted that the new statute had

the effect of further restricting the doctrine of *res judicata*. We quote, p. 8:

> "Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. See, *e.g.*, *Lurig* v. *United States*, 231 U.S. 9. Without distinction between intrinsic or extrinsic fraud, have the courts held this to be so."

As we understand the previous decisions *Johannessen et al.* the claim made by the defendants that the Naturalization judgment stood as a bar to Denaturalization Your Honors rejected this claim on the ground that Naturalization had been illegally procured. Now that Congress has repealed illegal procurement as a ground, we contend that Congress has closed the gates sufficiently to put back the bar as far as the case heard by Judge LaBuy was concerned.

The Hearing Officer unlawfully placed the Burden upon Petitioner.

In answer to our contention, the Court of Appeals said, herein p. 850:

> "He recognized the government's counter burden of showing unlawful entry and there is ample evidence that this burden was sustained."

The Hearing Officer did no such thing. We quote from the transcript (App. 103):

> Hearing Officer: "Well, I would like to have the record reflect that Mr. Stewart has been advised of the provisions of Section 291 of the Immigration and Nationality Act, which provides in part,
>
> > 'In any deportation proceeding under Chapter 5 against any person the burden of proof shall be upon such person to show the time, place and manner of his entry into the United States, but in

> presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records not considered by the Attorney General to be confidential pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law." "

Mr. Stewart: May I call your Honor's attention to the fact that that regulation just read doesn't state how that proof shall be made and it is our position that the proof of the entry has already been made and you will find it in those exhibits.

Hearing Officer: "Well, I will consider the issue in examining the transcript and the exhibits in the record."

In his opinion, the Hearing Officer said (App. 124):

> "Counsel for the respondent makes the claim that the respondent *has met the burden* of establishing the time, place and manner of his entry into the United States on the basis of the evidence already in the record, and he stated that he would offer no additional evidence." (Italics supplied).

It is obvious that the Hearing Officer here refers to the burden on petitioner, as he understood it, created by §291.

We quote from the Board of Appeals (App. 131):

> "The respondent stood mute in this proceeding as he did when before the United States District Court for the Northern District of Illinois. The respondent was advised of the provisions of Section 291 of the Immigration and Nationality Act (8 U.S.C.A. 1361)."

What the Board of Appeals said may be put like this:

> Respondent stood mute after having been advised that Section 291 cast the burden upon him.

Judge Perry did not mention our point.

The Hearing Officer had before him the Certificate of Arrival, herein p. 863 showing the time, place and manner of entry. Also he had before him the ship manifest (App. 268) in corroboration of the Certificate of Arrival. The Hearing Officer also had in evidence petitioner's Declaration of Intention (App. 267) sworn to by petitioner and accepted by the Examiners, upon which judgment had been entered fixing the time, place and manner of entry. Also, the Petition for Naturalization (App. 212) including another sworn statement by petitioner as to time, place and manner of entry.

Before the Hearing Officer warned us of Section 291, including his construction of the statute, the record before him showed the time, place and manner of entry without dispute. But the Hearing Officer refused to accept the facts, in the absence of testimony from petitioner. In *United States v. Murff*, 170 F. Supp. 182, District Judge Dimock has held that the burden of showing the entry to be unlawful rests upon the deporting power. We quote p. 184:

> "Section 291 of the Immigration and Nationality Act, 66 Stat. 234, 235, 8 U.S. Code §1361, provides: 'In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place and manner of his entry into the United States, * * *

> The corresponding section of the earlier law was Section 23, Immigration Act of 1924, 43 Stat. 165-166, 8 U.S.C. §221, which provided: '(1) In any deportation proceeding against any alien the burden of proof shall be upon such alien to show *that he entered the United States lawfully*, and the time, place and manner of such entry into the United States.' (Emphasis supplied.)

(1) In *Ulisidis* v. *Holland*, 3 Cir., 245 F. 2d 812, at page 814, Circuit Judge Hastie said: 'Actually, it was necessary to show only the single fact that the respondent was an alien, for, once that is proved, the legislative scheme requires the alien to justify his presence within the United States. 66 Stat. 234, 8 U.S.C. §1361.' "

When the Hearing Officer placed the burden on petitioner to prove a lawful entry, the Hearing Officer already had before him the Declaration of Intention (App. 267) as approved by Judge Wilkerson and the judgment entered by Judge Wilkerson (App. 219, 216) establishing that petitioner had become a lawful resident.

Judge Dimock said,

"Despite Judge Hastie's statement, it seems plain to me that Congress, by eliminating from the old law the provision requiring the alien to support the burden of showing that he entered the United States lawfully, leaves him with only the specified burden of showing the time, place and manner of his entry into the United States. The burden of showing that it was unlawful rests upon the deporting power."

Ulisidis v. *Holland*, 245 F. 2d 812, 150 F. Supp. 678, involves alien crewmen, who stayed beyond permits and who did not claim lawful entry. District Judge Cork, 150 F. Supp. 682, cited a case decided in 1927, *United States* v. *Flynn*, 22 F. 2d 174, and did not find it necessary to construe Section 291, as it now appears in the act of June 27, 1952, c. 477, Title II, ch. 9, §291, 66 Stat. 234, 8 U.S.C.A. §1361.

Ulisidis is easily distinguishable from the case at bar. In *Ulisidis* the Hearing Officer had enough evidence in the record to show that the crewmen were in this country illegally, having overstayed their leave. It was up to them to justify their presence or to suffer the consequence of leaving

abundant evidence uncontradicted. In the case at bar, the evidence already before the Hearing Officer justified petitioner's presence as a legal resident.

It is contended here that the Hearing Officer made a mistake in the construction of Section 291 and consequently placed the burden on petitioner to make further proof of a lawful entry. As was said by Mr. Justice Frankfurter, concurring in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 597:

> "Courts do enforce the requirements imposed by Congress upon officials in administrating immigration laws, *e.g., Kwock Jan Fat* v. *White*, 352 U.S. 454, and the requirement of Due Process may entail certain procedural observances. *E.G. Ng Fung Ho* v. *White*, 259 U.S. 276."

Please see dissenting opinion in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 598, on the right of a resident alien to be free from arbitrary banishment.

United States v. *Curran*, 15 F. 2d 127, affirmed *Vajtauer* v. *Comm'r of Immigration*, 273 U.S. 103, will demonstrate to Your Honors that if proceedings against petitioner had been conducted in 1924, the burden would have been different (§23 Comp. St. §4289 $\frac{3}{4}$ kk). In *United States* v. *Comm'r. of Immigration*, 36 F. 2d 239, decided when the old law was in effect, the absence of a record of the admission of the alien was said to have increased his burden. The presence of a record in evidence in the case at bar and the change in the terms of the statute should have influenced the Hearing Officer.

In the case at bar, the stipulated evidence demonstrated the time, place and manner of the entry in 1920 into the United States by petitioner. The burden of showing that such entry was unlawful rested upon the deporting power.

From the record, including that above quoted, it appears that the Hearing Officer made a serious mistake as to the law applicable.

The Court of Appeals said, herein p. 850:

> "It is respondent's contention that his reliance upon the Fifth Amendment in refusing to give additional information resulted in an inference by the Hearing Officer that the Section 291 burden was not met."

The Court of Appeals does not mention the case of *United States* v. *Murff*, 170 F. Supp. 182, or the fact that the statute has been changed and the Hearing Officer ignored the change and proceeded as if the old law were still in effect. The Hearing Officer assumed that a presumption or inference created by §291 and the failure of petitioner to testify took precedence over undisputed contrary evidence and a judgment of court. It was held in *McAdams* v. *United States*, 74 F. 2nd 37, that although possession of recently stolen property may call for explanation, explanation need not come from defendant.

In *Smith* v. *United States*, 157 F. 2d 176, 185, it was held that the theory on which the case was tried was so fundamentally wrong that the mistake called for reversal.

The Administrative Agency Acted on the Assumption that Section §291 of the McCarran Act Took from an Alien the Privilege against Self-Incrimination.

We quote from the opinion of the Hearing Officer (App. 123):

> "Upon examining these materials, I am not convinced that answers to the questions propounded to the respondent and which he declined to answer would support a conviction under a Federal Criminal Statute. * * * In finding that deportability has been established, no inferences need be drawn from the respondent's

claim of the privilege against self-incrimination nor from his silence, and a finding of deportability is based solely on the evidence of the record."

We submit that a study of the entire opinion will demonstrate that the Hearing Officer in fact did draw an unfavorable inference. We again quote (App. 109):

> "As a basis for declining to answer these questions, the respondent invoked the privilege against self-incrimination under the Fifth Amendment. The respondent was informed of the provisions of Section 291 of the Immigration and Nationality Act, which provides, in part, that in any deportation proceeding the burden of proof shall be upon the person under deportation to show the time, place and manner of his entry into the United States; and that if such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law. Counsel for the respondent was asked whether he wished to present any evidence in this matter and he stated that he would offer no additional evidence and that the evidence relating to the respondent's entry into the United States was already in the record."

It must be remembered that the evidence was in the record by stipulation. It was evidence furnished to the officials under oath in the naturalization proceedings, verified and accepted by them and made a part of the judgment entered by Judge Wilkerson. It is significant that Mr. Freedman asked petitioner questions as to entry and then stopped, apparently in reliance upon Section 291, as construed by the Government. In other words, the officials believed that the Fifth Amendment was qualified by Section 291.

Judge Perry said (App. 252), herein p. 833, after setting out the questions asked by Mr. Freedman:

> "No further questions were asked of him by the Examining Officer."

In other words, it can be seen from the record that in the first stages of this case, Section 291 was held to nullify the Fifth Amendment, so long as the questions were limited to the matter of entry. The Board of Appeals also found it significant to construe the Fifth Amendment in conjunction with Section 291. We again quote (App. 131):

> "The respondent stood mute in this proceeding as he did when before the United States District Court for the Northern District of Illinois. The respondent was advised of the provisions of Section 291 of the Immigration and Nationality Act (8 U.S.C. 1561)."

We submit that the Court of Appeals misapprehended the record in holding that the Hearing Officer did not rely upon the silence of petitioner. We quote, herein p. 850:

> "Respondent attacks the fairness of the administrative hearing with his claim that an improper inference was drawn from his refusal at the hearing to answer questions concerning his entry * * *
>
> "Without reaching the question of whether such an inference could be made, it is apparent from the record that the Officer did not rely upon any such inference."

The Hearing Officer did rely upon such inference, only he called it a presumption based on the authority of Section 291.

The Court of Appeals said, herein p. 851:

> "While respondent may have been within his rights in refusing to testify at the hearing, it does not follow that his reliance on the Constitutional protection can be used as a weapon to attack the fairness of the hearing in claiming that the government could only discharge its burden of proving his deportability by drawing unwarranted inferences from his refusal to testify."

The Court of Appeals has misapprehended our contention. The Hearing Officer threw the refusal to testify into the scale on the erroneous belief that petitioner was either required to testify or be presumed to be in this country illegally. The presumption made the burden easier on the Government. The Hearing Officer did not care why the petitioner did not testify. That must be the one reason the Hearing Officer could say: (App. 124)

> "In finding that deportability has been established, no inferences need be drawn from the respondent's claim of the privilege against self-incrimination nor from his silence, and a finding of deportability is based solely on the evidence of record."

But the Hearing Officer had regarded the evidence of record to be weighted with a presumption that petitioner was in the United States illegally and that presumption could only be erased, if at all, by testimony from petitioner.

We quote from *United States* v. *DeLucia*, 256 F. 2nd 493, 495, herein p. 826, which opinion was before the Administrative Agency:

> "To us it appears clear that he was entitled to rely upon the privilege which he claimed."

In addition to the information before the Court of Appeals at the time of its decision in the above contempt case, the Hearing Officer was informed as follows: (App. 101)

> Mr. Stewart: "* * * it will be seen that if Paul DeLucia answered these questions he would be acting as a witness against himself on possible charges of conspiracy and entering the country without right and getting others to assist him to do that, and that could be charged to be a continuing conspiracy—that is, as long as he stayed here he was carrying out the objective of that conspiracy, which consisted of many things illegal under the federal laws."

Surely the Hearing Officer did not intend to overrule the Court of Appeals on the law of the case. The record, we submit demonstrates that the Hearing Officer believed that the fact that this is a deportation case made a great difference, that the McCarran Act gave him the right to treat petitioner as if he were an alien at our gates seeking admission. It must be that the Hearing Officer believed that § 291 gave him authority to rule contrary to the Court of Appeals.

In the case at bar, the Court of Appeals makes no mention of *United States* v. *DeLucia*, 256 F. 2d 493, herein p. 823. Apparently the Court of Appeals has approved of the position taken by the Hearing Officer.

The error of an administrative tribunal may be so flagrant as to convince the court that the hearing accorded was not a fair one. *Tisi* v. *Tod*, 264 U.S. 131. A resident alien is within the protection of the Fifth Amendment. See cases cited in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590. In *Grunewald* v. *United States*, 353 U.S. 391, Mr. Justice Black said concurring, p. 425:

> "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution."

Mr. Justice Harlan said, p. 424:

> "If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter

completely. "On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible."

If the Hearing Officer really had given no heed to the claim of privilege in the consideration of the evidence that would be one thing, but the danger that he made impermissible use of the event is far from negligible.

In *United States* v. *Roberson*, 233 F. 2d 517, the Government seized an automobile claiming that it was being used in violation of gambling laws. The District Judge found for the defendant and the Government appealed. Judge Cameron said in affirming the trial judge, p. 519:

> "It is equally well settled, however, that the failure of a party to testify and the permissible inference to be drawn therefrom will not convert evidence otherwise insufficient into a *prima facie* case. It will not excuse a failure of the Government to meet the burden of establishing facts sufficient to make out a case for forfeiture. Until the Government has sustained the burden of producing evidence establishing its right to forfeiture, the claimant had no call to bring forward any evidence at all, but was entitled to submit the case to the fact finder, trusting solely to the weakness of the Government's evidence.
>
> (3, 4) It is not necessary to discuss the effect of the permissible presumption in a proper case because it is clear that the Government's proof did not establish even a *prima facie* case for forfeiture. It was necessary for the Government's evidence, of itself, to be sufficient to support the judgment sought. The Government's evidence and all inference which may be drawn therefrom, were entirely inadequate to support its demand for condemnation and forfeiture. We cannot say that, in the face of this weak showing, it was not natural and prudent for the claimant to intro-

duce no evidence at all. He was in position to rest secure upon the failure of the Government to make proof which would justify forfeiture. Under these circumstances, the failure of the claimant to testify cannot work against him so as to supply a case where, before, none existed."

The Petition for Naturalization subscribed and sworn to by petitioner on April 10, 1928, includes the following (App. 212):

"Fourth, I emigrated to the United States from Boulogne, France, on or about the 1st day of August anno Domini 1920, and arrived in the United States, at the port of New York City, on the 10th day of August anno Domini 1920, on the vessel Ryndam.

"Fifth. I declared my intention to become a citizen of the United States on the 9th day of January, anno Domini 1925, at Chicago, Illinois, in the Circuit Court of Cook County. • • •

"Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Labor, together with my affidavit and the affidavits of the two verifying witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America and that his name be changed to Paul DeLucia. • • •

"Declaration of Intention No. 162,822 and Certificate of Arrival from Department of Labor filed this 10th day of April, 1928."

The attached Certificate of Arrival (Photosat in Vol. II, p. 1 of App. in 12903) herein p. 863, correctly shows the time, place and manner of arrival. This Petition for Naturalization including the Certificate of Arrival, was before the Hearing Officer as an exhibit (App. 121). The Hearing Officer had before him the record showing that

Judge Wilkerson had accepted and approved the showing made by petitioner, as to the time, place and manner of entry. Petitioner could not have been a resident, as required by law, unless he had entered legally. It has been held that if the Hearing Officer failed to consider evidence before him he exceeded his authority. *Lloyd* v. *Etting*, 287 U.S. 329, 339.

The Hearing Officer construed Section 291 in such manner as to require petitioner to either testify or suffer the penalty of a presumption that petitioner was an alien in the United States in violation of law.

The Administrative Tribunal failed to distinguish between a passport issued to petitioner and one issued to another and used by petitioner.

The failure on the part of the courts below to make the proper distinction started with the opinion rendered by Judge LaBuy, from which we quote, herein p. 809:

> "The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention had been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States."

We quote from *United States* v. *Goldstein*, 30 F. Supp. 771, 733, cited by Judge LaBuy:

> • • • what the respondent offered was a passport, not issued to him, but to his cousin. • • •

In the case at bar the passport was issued to petitioner, at any rate there was no evidence to the contrary. The theory of the Government was that it could be found that petitioner had no passport at all, as charged in the warrant (No. 5, App. 84).

In *United States* v. *Shapiro*, 43 F. Supp. 927, 928, the question resolved against the defendant was,

> "Can the United States of America cancel a certificate of citizenship issued to an alien, *where the evidence discloses* that the alien secured both a visa and a passport which had been issued to another person and the alien represented herself to be that person." (Italics supplied)

In the case at bar the evidence did not disclose any such thing, yet Judge Perry assumed that it did so disclose.

In the case at bar, there is no charge in the warrant that petitioner entered without inspection, but the Administrative Tribunal did use the same reasoning as that rejected in *Ex Parte Gouthro*, 296 Fed. 506, affirmed 8 F. 2nd 1023. In the case at bar it was said that the passport was no passport. In the *Gouthro* case it was said that the inspection was no inspection. We quote, p. 509:

> "The third and last ground for the deportation of the petitioner as stated in the warrant, is the finding that she 'entered by means of false and misleading statements, thereby entering without inspection.' The provision of the statute relied on by the government in this regard is section 19 of the Immigration Act (Act of February 5, 1917, c. 29, 39 Statutes at Large, 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §4289¼ jj]), which provides, among other things, that:
>
> > 'Any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.'

"It will be noted that all of the provisions just quoted are directed against, and obviously designed to prevent, the entry of aliens surreptitiously and without an opportunity on the part of the immigration officials to ascertain, in the manner provided by law, whether such aliens are entitled to enter this country. The only question in this connection which is material here is whether the petitioner entered the United States 'without inspection.'"

Certain datum-points must be accepted as having been proved, including the following:

(1) Petitioner had a passport.

(2) Petitioner had a visa.

Otherwise, according to the testimony of Ferro (App. 90) petitioner would have been stopped and held for a Board of Special Inquiry. The Government caused a subpoena to be served on petitioner commanding him to produce his passport and other travel documents. (Ex. A-59, App. 277) Petitioner did not contest the right of the Government to issue the subpoena as did the alien in *Sherman* v. *Hamilton*, 295 F. 2nd 516.

Petitioner said he could not find the papers previously in his possession (App. 97). This gave the Government the right to prove the contents of the documents demanded by secondary evidence. The Government did not avail itself of this right. Instead the officials relied upon Section 291 and put the burden on petitioner to show a lawful entry with a valid passport and visa.

By the testimony of Ferro (App. 90), the Government produced enough to create an inference that the name on the passport presented by him was Paolo Maglio, because that was the name on the manifest. The Hearing Officer ignored other notations on the manifest to raise the infer-

ence that the passport identified petitioner and could not have identified the witness Maglio, including height, occupation and complexion.

We quote from *Viannopoulos* v. *Robinson*, 247 F. 2d 655, 658:

> "Furthermore, we conclude that, on the basis of the record before us, the order is not supported by evidence which is reasonable, substantial and probative of the issue. Of course, we are aware of the narrow scope of review within which we must operate and recognize that the matters of credibility are properly for the trier of the facts. However, as pointed out in *Consolidated Edison Co. of New York* v. *N.L.R.B.*, 305 U.S. 197, 229: 'substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Further, although it is up to the trial tribunal to resolve the conflict of testimony, nevertheless, as emphasized in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488: 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'
>
> "The court, in *Universal Camera*, 340 U.S. at page 488, added:
>
> > 'Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the 'body of evidence opposed to the Board's view.' "

The rule is stated in *Zito* v. *Mottal*, 174 F. Supp. 531, 537 and authorities are collected in re inferences drawn by an administrative trier of fact. The test of substantial evidence is not satisfied by evidence which gives equal support to inconsistent inferences.

The Hearing Officer said (App. 121):

> "The evidence in the record has established that the respondent entered the United States in August 1920 by assuming the identity of Paolo Maglio and was not held for hearing before a Board of Special Inquiry. *It is reasonable to conclude that at the time of the admission the respondent presented a passport* in the name of Paolo Maglio and thereby gained entry into the United States. It has been established that the respondent is not Paolo Maglio and that he is, in fact, Felice DeLucia. He, therefore, did not present a passport showing his true identity; *he was not the person described therein;* and the passport presented did not constitute a passport within the provisions of the Executive Order." (Italics supplied.)

So Your Honors may perceive that the Hearing Officer has found that petitioner presented a passport. The Court of Appeals said, herein p. 848:

> "The respondent did not produce his passport at the hearing as requested. The Officer concluded, however, that he possessed a passport at the time of his entry into this country because, as the evidence showed, if he were not in such possession, he would have been detained at the point of entry for a Board of Special Inquiry and a notation of this would have been made on the ship's manifest."

In the absence of the production of the passport, we request an examination of the evidence in order to determine if

> "*he was not the person described therein.*"

We are able to demonstrate from the exhibits that petitioner in fact was described in his passport. Also that the witness Maglio was described differently in his passport. We have in the record the original passport of the witness Maglio, as Ex. 14-K (App. 275). He was described therein, as we have set out in our statement.

Please note the differences between the witness Maglio and the petitioner.

We note that the witness Maglio has signed his passport. Now as we examine the manifest (Ex. 13, App. 272) we observe that the witness Maglio is described thereon, including a notation of his height as 5 feet 3 inches. Complexion nat. Color of eyes, brown. Ex. 14-K (App. 274) includes a description of the witness Maglio as having eyes of light blue. We assume that the Inspector checked this height and other items of personal description with the passport, as did the surgeon. The witness Maglio was required to take a writing test, so we assume that the Inspector made certain that his signature corresponded with that shown on his passport. We are left to guess as to how the Inspector happened to admit an alien, described on the manifest as having brown eyes, and in the possession of a passport describing the holder as having light blue eyes. Also we know from Ex. 14-J (App. 272) that at the time of entry the witness Maglio was a soldier of Italy on convalescence leave, not a civil employee. We do not know whether Mr. Beck knew about that or not. Nor do we know what Mr. Beck would have done about the light blue eyes, except that apparently the witness was admitted without a Board of Special Inquiry.

With reference to the Inspector we quote from *Ex Parte Gouthro*, 296 Fed. 506, 511, affirmed 8 F. 2nd 1023:

> "The legal presumption, in the absence of any evidence to the contrary, must be that he properly performed the duties required of him and that what he did constituted whatever inspection was required under the circumstances."

In the absence of any evidence as to what took place between the witness Maglio and the Inspector, we must assume that the witness explained differences between his

passport and his personal description. The Inspector either knew the correct color of his eyes or the Inspector should have known. The Inspector had a duty and a responsibility which has been disregarded by the Hearing Officer in the consideration of the case before him as to petitioner.

The mere mention of such facts should help to show how unreliable is circumstantial evidence after a main actor had died and the Government relies upon proof of usual procedure. *Cf. United States* v. *Cufari*, 120 F. Supp. 941, 217 F. 2nd 404; *United States* v. *Profaci*, 274 F. 2nd 289.

Now we turn to the manifest of the S.S. Ryndam (Ex. 7, App. 268) and find that petitioner is described as having a fair complexion and a height of 5 feet 7 inches. We assume, in the absence of any other evidence, that petitioner's passport is in the same form as that shown for the witness Maglio. Therefore petitioner's passport included a description of petitioner as being fair complexion, height 5 feet, 7 inches. We assume that petitioner's passport was signed by him. That petitioner also submitted to a writing test. So we conclude that the Inspector must have known that petitioner was in fact the person described in his passport.

The fact that the two aliens were examined by the same Inspector within a period of about two weeks should lead to the conclusion that the passport held by petitioner was in fact issued to him. Certainly Mr. Beck knew that he had admitted two different men, one 5 feet, 3 inches, the other 5 feet, 7 inches in height; one with light blue eyes, and the other with brown eyes; one of natural complexion, the other fair; one a soldier claiming to be a civil servant, the other a day laborer. Surely Mr. Beck gave but slight importance to the name alone.

The Certificate of Naturalization (App. 215) bears a description of petitioner. Such description corresponded with the description shown on the manifest. It can be deducted that the manifest and the passport were either alike, or any differences were explained to the satisfaction of Mr. Beck. The purpose of the Government in producing the testimony of Ferro (App. 90) as we understand it, was to show that if petitioner had presented a passport disclosing any difference between the passport and the manifest, petitioner would have been stopped for the Board of Inquiry. The Government argues from the failure of Mr. Beck to stop petitioner that his passport and the manifest must have been in agreement as to the name used by petitioner. The Hearing Officer paid no attention to other notations on the manifest to identify petitioner as the holder of a passport issued to him and to no one else.

The lack of value as to the testimony of Ferro (App. 90) and the explosion of the Government theory, is made evident when we notice that Mr. Beck passed the admission of the witness Maglio, shown on the manifest to have eyes of brown, in possession of a passport describing the holder with the eyes of light blue. We might assume further that the witness Maglio or someone explained how the passport and the manifest happened to differ, whereupon Mr. Beck accepted the explanation and passed the alien. In other words, Mr. Beck exercised a great deal of authority in excess of that explained by Mr. Ferro.

Also the Declaration of Intention (App. 267) includes a description of petitioner. Here again the Examiners made a check and found that petitioner had been properly described. All of this culminated in a description contained in the Certificate of Naturalization (App. 215) is

sued by Judge Wilkerson to the effect that petitioner has a height of 5 feet 7 inches.

The record relative to the witness Maglio was also before the Hearing Officer. He was described in his passport as having a height of 5 feet 3 inches. This height was noted on the manifest (Ex. 13, App. 272) This short height was also recorded on the Declaration of Intention (Ex. 8, App. 269) made by the witness Maglio. It was checked by the Naturalization Examiners and included as a description of him in his Certificate of Naturalization (App. 271)

After Your Honors examine the record it will be observed that petitioner must have been described in his passport and the witness Maglio was described differently in his passport. It is true of course that the name Maglio was the same for petitioner and for the other immigrant.

But the name alone would not matter. The assumed name of Maglio was in fact petitioner's name at the time of entry, even if it be shown that Maglio was not the name given him at birth. Judge Major said in *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263, 265:

> "We reach the conclusion under the circumstances presented, that no fraud was intended, and, as a matter of fact, none was perpetrated on this government by appellee in obtaining his immigration visa.
>
> "Whether the use of such name and age enabled him to escape military service in some other country, we are not directly concerned. He was within the quota provision, could have obtained his visa by stating his correct name and age, and otherwise met the prescribed requirement to enable him to effect a legal entry. Therefore, the misrepresentations complained of were irrelevant and do not constitute grounds for deportation."

In *In Re Leibowitz*, 49 F. Supp. 953 where Judge Holly admitted this alien to citizenship the District Court said, p. 954:

> "The Circuit Court of Appeals held that the alleged false statement made by him as to his name to obtain entry to the country was not sufficient grounds for deportation and I am of the opinion that the use by him of the name Feive Leibowitz is not a sufficient reason for denial of naturalization. (2) As a matter of fact his name at the time of his entry into the United States was Feive Leibowitz. At common law and in the absence of statutory restriction an individual may lawfully change his name without resort to any legal proceeding and for all purposes the name thus assumed will constitute his legal name, just as though given at birth. *Reinken* v. *Reinken*, 351 Ill. 409 413; 184 N.E. 639; *United States* v. *McKay*, D.C. 2 F. 2d 257; *Christianson* v. *King County*, D.C. 196 F. 791. And the fact that he took the name of another living person, even the name of his brother, it seems to me, does not change the rule."

The case at bar and the cited case would be much alike if the Government now filed a denaturalization case against Leibowitz based upon the same objection considered by Judge Holly. Your Honors know of course that the next judge would lack jurisdiction to try the objection over again. After all, a judgment does settle some things. We request attention to *United States ex rel. Fink* v. *Reimer*, 96 F. 2nd 217:

> "See also same case in 16 F. Supp. 487. It appears that in previous litigation the citizenship of this defendant was cancelled and he pleaded guilty to an indictment charging him with procuring naturalization illegally. The correctness of the denaturalization or the legality of the jail sentence was not before the Court in 16 F. Supp. 487. Here we have a habeas corpus proceeding intended to stop deportation."

As a part of the return in this *Fink* case, defendant's admissions made to the Examiner give the whole story of the fraud perpetrated by him in obtaining his immigration visa. He pretended to be one Apfelroth who had previously started proceedings to obtain a preference because of a son living here. Judge Hand said p. 218:

> "An alien who enters under a passport and visa fraudulently obtained is 'not entitled' * * * to enter under the Act of 1924. It is true that to be admitted as a quota immigrant Fink only had to have an unexpired immigration visa, section 13(a) (1) of the Quota Act of 1924, 8 U.S.C.A. §213(a) (1), and that he did have one; both passport and visa were in fact issued to him, that is, to the man who appeared before the officials though under the name, Apfelroth. It is hardly true, therefore, to say that the documents were 'no' passport and 'no' visa; *they were not for instance like passports issued to another person, whom the bearer pretends to be.* Moreover, a fact suppressed or misstated is not material to the alien's entry, unless it is one which, if known, would have justified a refusal to issue the visa. *United States ex rel. Iorio v. Day*, 34 F. 2d 920; *United States ex rel. Leibowitz v. Schlotfeldt*, 94 F. 2d 263; *McCandless v. United States ex rel. Murphy*, 47 F. 2d 1072, appears to be the contrary. In the case the fraud here was essential to success; Apfelroth could get a preference visa, Fink could not." (Italics supplied)

After Your Honors learn from the record that petitioner and the witness Maglio were distinguished as two different persons, the name used should have little significance.

Judge Perry said: (App. 260) herein p. 841:

> "One who presents a passport issued in the name of another is not presenting identification of himself."

This improperly assumes that the identification of the holder of a passport is limited to the name.

The Court of Appeals said, herein p. 848:

> "This recital of facts makes it apparent that DeLucia materially misrepresented his name, age, birthplace and parentage, and that he assumed the identity of another, namely, Paul Maglio. Accordingly, there was substantial evidence before the Special Inquiry Officer to find that respondent entered this country without a valid passport showing his identity."

The misrepresentation of name, age, birthplace and parentage is not enough under the circumstances to assume the identity of another. All of the tribunals below have ignored other facts to show that it was impossible for petitioner to assume the identity of the witness. As Your Honors must know from the record, the passport did identify petitioner as distinguished from the witness Maglio. The Hearing Officer neglected to give heed to the effect of the decision made by Mr. Beck to admit petitioner and the witness Maglio in spite of differences between the passport and the facts ascertained at the port of entry. It must be remembered that the law provided a penalty put on ship owners for bringing aliens known to be not admissible. *Italia* v. *Durning*, 115 F(2d 711. A ship doctor would not mistake a 5 foot seven inch man for one 5 feet three inches, a brown-eyed man for one with light blue eyes. We conclude that each man was described differently from the other in his passport. No one concerned would depend on the name alone. The passport in each case was visaed by the American Consul. (Ex. 14K, App. 274) We assume that the passport and visa presented by petitioner also bore numbers. The Government is in possession of a record of these numbers. In the absence of the production of this evidence, we assume that the numbers on petitioner's passport differ from the numbers on Ex. 14K. It follows that each of the aliens had his own passport.

Suppose the witness was before the Hearing Officer on the charge that he did not have a passport showing his identity because his passport describes him as having blue eyes. Would not it be fair to assume, in the absence of the testimony of Mr. Beck or any other evidence on the subject, that the witness convinced the Inspector that his passport had been issued to him in spite of the difference between the passport and the manifest? Would it not be fair to assume that the witness explained that the notation of his occupation as a civilian (App. 274) instead of as a soldier on leave was also explained.

The testimony of the witness Maglio before Judge LaBuy (App. 147) shows that he claimed that he had lived in Apricena all his life prior to leaving for the United States "except when I was in the army * * *. I served in the Italian Army from 1917 to 1920."

Giving the impression that the obligation had ended prior to leaving. His military record (Ex. 14-I, App. 272) shows that he was called to active service Feb. 2, 1917, given one year convalescence leave August 18, 1919, not discharged until September 12, 1921. So when he took the boat, it appears that he was a soldier on leave. We may assume that the witness explained how it happened that his hair was said to be black in his passport (App. 275) and brown on the manifest (App. 272). As to petitioner is it not fair to assume that Mr. Beck satisfied himself as to identity.

There was no evidence as to who made up the manifest or where the maker of the manifest obtained the information to be found on the manifest. The Hearing Officer must have made inferences concerning where the information had been obtained and then must have made more inferences based on the first inferences.

We must give credit to the assumption that the Hearing Officer and the officials of the Board of Appeals knew that in 1920 violation of the Passport Act did not authorize deportation. Their contrary decision can be understood, we submit, if Your Honors determine from the record that the Administrative body construed the McCarran Act, Section 241 (a) (1) of the Immigration and Nationality Act, to express the intention of Congress to put all aliens back at our gates and to treat them as if they were just arriving. The administrative officials have failed to heed *Shaughnessy* v. *United States*, 345 U.S. 206, 212, where it was said that aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to due process of law.

The facts proved, if fairly considered, must lead Your Honors to conclude that plaintiff entered by virtue of a passport, duly issued to him and further that he presented a valid visa as required.

After Your Honors study the testimony of Mr. Ferro, (App. 90) it will be observed that Mr. Ferro told us what might happen if petitioner had no passport or had presented a passport in a name other than Maglio as per the manifest. Petitioner would have been held to a Board of Special Inquiry. We assume that if any questions arose suggesting that Mr. Beck, the Inspector, might be inclined to reject petitioner, Mr. Beck would not take the responsibility alone. He would give the alien a chance before a Special Board. The Government at the deportation hearing left us to guess what may have happened if Mr. Beck had proceeded to assume the responsibility of passing on questions raised in his mind and had decided to admit petitioner. Concerning inspection it was said in *Ex parte Gouthro*, 296 Fed. 506, aff'd 8 F. 2d 1023:

> "Even if the petitioner made false and misleading statements to him (the inspector) he was not obliged

> to accept them as true, or to refrain from such further questions and investigations as would enable him to reach a proper conclusion as to the right of petitioner to enter the country."

We quote from Auerbach, IMMIGRATION LAWS OF THE UNITED STATES, 2nd Ed., p. 359:

> "The initial examination of an alien, called primary inspection, is conducted by an inspecting immigration officer. He can admit but not exclude the alien."

The Hearing Officer ignored the fact that the executive Department had delegated authority to Mr. Beck. Mr. Beck made a decision based upon the evidence before him, that petitioner was eligible for admission. From the manifest and the statute requiring a registry, we know that Mr. Beck paid particular attention to the personal description of an alien, his age, occupation, height, color of hair, color of eyes and complexion. In the absence of evidence of what Mr. Beck acted upon, the Hearing Officer arbitrarily assumed that petitioner had made untruthful statements to Mr. Beck. Although Mr. Beck could not be produced because of death, other officials no doubt participated. There has been no attempt to explain the absence of other evidence. The testimony of Ferro leaves much to speculation. Mr. Beck made a decision within the scope of his authority, acting for the Attorney General. Petitioner relied upon the decisions made by Mr. Beck, filed his Declaration of Intention and renounced his allegiance to the King of Italy. We refer to *United States* v. *Certain Parcels of Land*, 131 F. Supp. 65, where the doctrine is considered. So we submit that the matter of deciding who has the burden of proof becomes extremely important. Especially when the record presents serious gaps and failure of proof relative to entry. Error of law which precludes investigation of essential facts on hearing makes

the hearing unfair. *Ex Parte Ver Pault*, 86 F. 2d 113, *Gegiow* v. *Uhl*, 239 U.S. 3.

It should be accepted as a fact that petitioner did have a valid visa. Otherwise, according to Ferro (App. 90) petitioner would have been stopped and held for a Board of Special Inquiry. In § 1361; Title 8, we find the following:

> "* * * If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa, or other document required for entry, shall be issued to such person, nor shall such person be admitted to the United States."

In *Silva* v. *Tillinghast*, 36 F. 2d 801, Judge Morton said p. 802:

> "The question which the case presents is whether the immigration tribunals had the right to go behind the visa, to examine into the facts on which it was based, and having concluded that it was erroneously issued to disregard it."

The question whether the immigration officials had this right, at the time of entry, does not arise for the reason that such officials accepted the visa and admitted petitioner. At this late date, forty years after the acceptance of the visa, the immigration tribunal has ignored the visa. The Hearing Officer has disregarded the fact that the Government suppressed the evidence which would have shown what may have been before the American Consul when the visa was granted. The Hearing Officer and the Court of Appeals gave no heed to the visa and its effect. Judge Perry said (App. 261) herein p. 841:

> "In misrepresenting, as he did, his true identity, he perpetrated a fraud on the government in obtaining his immigration visa."

There is not a scintilla of evidence as to any representation, true or false, made by petitioner in order to obtain his visa. There is a presumption that the Consul did his business in a proper manner. *United States* v. *Chemical Foundation*, 272 U.S. 1, 14; *Ussi* v. *Folsorn*, 254 F. 2d 842. Presumption of validity attends official action and the burden of proof to the contrary is upon those who challenge the action. *Aero Mayflower Transit Co.* v. *Carpentier*, 167 F. Supp. 898.

When petitioner obtained his visa the burden was on him. The fact that he satisfied the Consul is shown by the issuance of the visa. To say now that he met that burden by some fraudulent misrepresentation is arbitrary, in the absence of any evidence as to what representations were made.

After observing that the consular officer was required to pass upon questions of fact and of law, the court said in *Silva*, p. 802:

> "He belongs to an entirely different department of the government from the immigration bureau; and to hold that his decisions on such matters are reviewable by the immigration tribunals would be basically inconsistent with the general principles of our government administration. * * * the immigration tribunals have no right to refuse admittance upon the ground that the visa presented was in their opinion mistakenly or improvidently granted by the consul."

If the immigration tribunals had no right to refuse admission, certainly they have no right to deport upon the ground that, in their opinion, the visa was mistakenly or improvidently granted by the Consul. Particularly in the absence of any evidence as to what had taken place before the American Consul. Whether or not the immigration officials could have turned back petitioner in 1920 on

the ground that his visa should not have been issued is a moot question. They accepted the visa and should not be permitted to ignore that action, especially in the absence of any mistake on the part of the Consul. The adverse action of the Administrative Tribunal can be understood only if Your Honors accept its construction of the McCarran Act, a construction which permitted it to regard petitioner as if he stood at the gate in New York.

In *Hempel* v. *Weedin*, 23 F. 2d 949 (Reversed 28 F. 2d 603) the alien claimed to have told the consul about his foreign conviction prior to the issuance of his visa. Judge Cushman said, p. 951:

> "* * * otherwise it does not appear reasonable that he would have obtained the visa."

The Immigration Official who heard the deportation case wrote the Commissioner General of Immigration and received this reply, p. 951:

> "If any official document having reference to the matter was filed with the American consul, it is probably attached to the immigration visa, which should be in the files of the Naturalization Bureau at Washington, to which reference may be had if the point is considered material."

Judge Cushman said:

> "There has been no showing that such papers as those mentioned were not attached to the Immigration visa."

The law required a number for the visa and that number to be on the manifest. We have been unable to find the number of the visa on the photostat of the manifest. It may be there to be seen on the original. The Inspectors at the port of entry were required by law to preserve the visa, so Your Honors are required to accept as a fact that a copy of the

visa, together with a copy of the papers required for its issuance, are now in the possession of the Immigration Officials.

In the absence of the production of evidence in the possession of the Government, we assume that the American Consul was informed as to any trouble petitioner may have had with the authorities in Italy. If in fact petitioner was convicted of a crime in his youth, the American Consul was in a better position to determine whether or not it included moral turpitude than the Hearing Officer, guessing fifty years later and thousands of miles from the scene.

Your Honors no doubt have examined enough records to have knowledge of the avenues open to the Immigration Authorities for investigation. The absence of evidence from the American Consul and the Italian Officials about passports leads us to suggest that the information obtained was suppressed. In *Ex parte Motoshige*, 6 F. Supp. 792, the administrative tribunal received a letter from the United States Consul that no passport had been issued to the alien. This case suggests some of the avenues which were open for investigation. Naturally we assume that the Government officials actually made full use of all avenues of information.

> "Failure to produce evidence within the control of a party raises the presumption that, if produced the evidence would operate against him; and every intendment will be resolved in favor of the opposite party; * * *" *Shiell v. London Amusement Co.*, 123 F. 2nd 302, 306.

Also please see cases cited in 31 C. J. S., EVIDENCE § 156, p. 847.

The Government Suppressed Important Evidence Within the Control of Its Officials.

As far as this record discloses, the Consul knew, at the time of the visa, all that has been learned since that date by all of the other departments of the government put together. It is fair to assume that Mr. Rando (App. 154), at the time of his investigation, in 1957, knew of its purpose and had such information as Your Honors may now derive from the various exhibits in evidence. Mr. Rando knew that, from his Declaration of Intention (App. 267) and Petition for Naturalization (App. 212), petitioner arrived on the steamship Ryndam, after embarking in France. Mr. Rando knew that petitioner passed inspection at New York and was admitted as the bearer of a passport together with a visa. Mr. Rando also knew the name on the passport and of the fact that petitioner had had this name changed by Judge Wilkerson. Not a word did Mr. Rando say as to whether petitioner had used the name Maglio in France or Italy. Surely Mr. Rando must have inquired. One of the first things Mr. Rando did, no doubt, was to inquire about the passport and the visa. The fact that he did not tell Judge LaBuy what was learned by him and the fact that he did not produce any papers or records concerning the passport and the visa issued to petitioner, must compel any fair minded person to conclude that the passport and the visa were found by him to have been regularly issued. Mr. Rando obtained copies of birth and death certificates, marriage records and various papers purporting to show a criminal record. Now we know from the various documents put in evidence that Mr. Rando must have known, in view of the pendency of a denaturalization suit, that the passport and visa might be drawn into question.

Is it not fair to assume that Mr. Rando inquired of the American personnel and inspected the records, to deter-

mine how much the Consul knew about the personal history of petitioner and whether or not that official had been deceived? Of course we know that that must have been one of the first things Mr. Rando inquired into. Yet we do not find a word in his testimony concerning such matters. Keep in mind that we here deal with the testimony of a lawyer, an expert, experienced in such matters. It must be remembered that Judge Perry found that petitioner committed a fraud on the government in obtaining his immigration visa (App. 261), herein p. 841. Judge Perry failed to notice that the Government suppressed evidence on the manner in which the visa was obtained. The finding made by Judge Perry has absolutely no support in the evidence. Suppression of evidence or concealment from a party whose rights are being determined by an administrative tribunal has been held to be so unfair as to invalidate the administrative proceeding. *Lloyd* v. *Ettica*, 287 U.S. 329, 339. In *United States* v. *Curran*, 298 F. 951, Judge Hand spoke of the unfairness of a judgment made without seeing a paper, said to be in the possession of the Consul. We quote from Kansas, Immigration and Nationality Act (1953) p. 131:

> "One who swears falsely before an American Consular officer who is empowered by law to administer oaths (22 U.S.C. 131) commits a crime against the United States. A deliberate false oath is always an act involving moral turpitude. (Administrative Decisions Vol. I, p. 14; *Kaneda* v. *United States*, 278 F. 694; *Masaichi Ono* v. *Carr*, 56 F. 2d 772; *U. S. ex rel. Mauka* v. *Palmer*, 67 F. 2d 1146)."

Is it not fair to conclude that if petitioner had misrepresented anything or sworn falsely before the American Consul that the Government would have proven the fact? In the absence of this evidence, petitioner should have

been afforded a presumption which has been ignored to date, although often requested below.

Your Honors will note that Mr. Rando took pains to make it clear that he did not testify that the documents were all of the documents he found or brought back (App. 156). Mr. Freedman, representing the Government at the deportation hearing, demonstrated that more evidence, in addition to that before Judge LaBuy, was required as to entry. He caused a subpoena to be served, demanding that petitioner produce his passport. When petitioner said he was unable to find the passport (App. 97), the door was then opened to permit the introduction of secondary evidence. But no evidence was produced, further than the exhibits and the testimony of Ferro (App. 90). This demonstrated circumstantially that petitioner entered legally in possession of a proper passport plus a regular visa. Your Honors are left to speculate as to why Mr. Freedman did not follow up on his demand for production of the passport.

We assume that when Mr. Freedman prepared the subpoena (Ex. 59 A, App. 277) he expected to be required to prove, either by direct evidence, or by secondary evidence, just what travel documents were used at the time of entry. The situation was altered when the burden had been improperly shifted to petitioner at the hearing.

Judge Perry said (App. 260), herein p. 841:

> "Petitioner had not previously assumed or used the name of Paul Maglio."

This finding is contradicted by the record. We know that petitioner was using the name Maglio when he obtained his passport. This date is not shown because the Government chose to suppress the evidence. Your Honors will note from *United States* v. *Grabina*, 119 F. 2d 863, that the de-

fendant obtained his papers under the name of Ginsberg. Judge Swain said p. 864:

> "The use of the name Ginsberg was not intended to deceive, and so far as appears, did not deceive the officials who passed upon his eligibility for naturalization. His declaration of intention and his petition gave the date of arrival, the name of the vessel and the port which he entered. Anyone checking his entry must have known that he entered as Josek Grabina."

So the change of name did not in fact deceive the officials.

In view of the record showing that the Naturalization Court heard witnesses in open court (App. 217), the fact that the petition requested a change of name (App. 207) and the statutory requirement that good cause must be shown, before a name change will be allowed, it is fair to assume that Judge Wilkerson satisfied himself as to the reason petitioner made his original application in the name of Maglio. In *In re Perkins*, 204 Fed. 350, the citizen sought to amend the record as to his name. It was held that after the term had passed, the court could not alter its judgment, which spoke correctly as of its date. In *United States* v. *Batikoter*, 228 Fed. 918, it was held that the age of the petitioner was a question of fact settled by the Naturalization Court. In his Preliminary Form (App. 207) petitioner said his name was Paul Maglio and that he also had used the name of Paul DeLucia. It may be presumed that the Naturalization Judge inquired as to the true name and ascertained enough of the facts to make an intelligent judgment. If in fact the Naturalization Judge ordered the change of name without requiring any explanation from petitioner, there had been no representations, true or false. If the Naturalization Court acted upon the Petition for Naturalization (App. 214), alone, all that contained was a prayer.

Your Honors will notice, from the photostatic copy of the Petition for Naturalization (App. 212, 214, Vol. II, p. 1) that just above the signature Paul Maglio and added by typewriter there appears the following:

> "• • • • and that his name be changed to Paul DeLucia."

This petition was prepared under the supervision of the officials by a clerk in the office of the Service (App. 141). It is fair to assume that before this request for change of name was included there had been some discussion. On the reverse side of the Certificate of Naturalization there appears the following (App. 217):

> "By the order of court, name changed from Paul Maglio."

The Hearing Officer gave no heed to the above judicial finding that the name of your petitioner before the legal change, had been Paul Maglio. Upon this review of the deportation proceedings, Your Honors are requested to note that the Naturalization Court has found, in a judgment binding upon all concerned, that:

(a) The name had been Paul Maglio.

(b) The name was changed to Paul DeLucia.

There is no evidence as to when petitioner first adopted that name, or his reasons. Upon his Preliminary Form we find the following (App. 208):

> (i) I purchased the ticket on which I came to this country at *Naples Italy*. It was purchased by *an Agency*. (Italics handwritten.)

Surely Mr. Rando inquired in Naples and learned the details but the result of his investigation was suppressed.

In the absence of any evidence to the contrary we must assume that the passport was issued to petitioner under

"that name": We also know that he obtained a visa under that name. The visa was issued to petitioner. We must conclude this in the absence of contrary evidence. It is fair to assume that Mr. Rando learned the date of the purchase of the ticket. Mr. Rando learned the mode of travel from Italy to France, how long petitioner resided in France and if he used the name Maglio in France.

In *United States* v. *Grabina*, 119 F. 2d 863, as we have said, the alien entered under the name of Josek Grabina. When he filed his first papers he did so under the name of Ginsberg. Petitioner in the case at bar filed his first papers under the name he bore at the time of entry. The following appears in the testimony of Examiner Jordan (App. 188):

> Q. On the face of Exhibit 2 it says: "Petitioner wants: Paul DeLucia" What does this mean?
>
> A. That he wanted to include in his petition a prayer for a change of name.
>
> Q. His name being Paul Maglio and he wanted it changed to Paul DeLucia?
>
> A. That is right.
>
> Q. But the practice was to require him to sign in his present name?
>
> A. That's right.
>
> Q. Not in the name he wanted?
>
> A. That's right.

The point is that the inspectors and Naturalization Examiners knew when and where the alien entered, as to petitioner and as to Grabina. The Government recognized and approved of the fact that petitioner had previously been known as Maglio. When petitioner signed his name to his Petition for Naturalization we know from the evidence that the Naturalization Examiner knew that he had used two names. When petitioner applied for his visa we don't know anything about the names used because the

evidence was suppressed. When petitioner applied for entry, we do not know what the Inspector knew about names used because of the absence of evidence on the subject.

Your Honors will observe that in the warrant, petitioner is alleged to have been also known as Paul Salvi and as Paul Ricca. The officials could have said, also known as Paolo Maglio, but such identification has been avoided.

The Hearing Officer considered matters not introduced in evidence, in the absence of proof.

We quote from *Yiannopoulos* v. *Robinson*, 247 F. 2d 655, 657,

> "(3) However, after scrupulous examination of the record, we conclude that most of plaintiff's objections were well founded and that by the admission of a mass of incompetent, irrelevant and hearsay evidence, though form was observed, plaintiff was denied the substance of a fair hearing. There is no need to go to great lengths in describing the multitude of erroneous rulings presented by the record. Indeed, such an attempt would be misleading, for, as previously stated, the ordinary rules of evidence are not generally adhered to. Rather, it is the overall denial of justice which impels our conclusion. Suffice it to say, that, without the admission of this evidence, it is, at least, highly uncertain whether the finding of the Special Inquiry Officer would have been made. It is on this basis that we conclude that the hearing was unfair. This line of thought finds support in the language of the Supreme Court in *Bridges* v. *Wixon*, 326 U.S. 135, 156: 'In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong • • • or by showing that incompetent evidence was admitted and considered • • • *But the case is different where evidence was improperly received and where but for*

that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing * * *." (p. 658) (Emphasis supplied by Judge Lindley:)"

We carry our argument a step further and contend that the evidence improperly received was insufficient to stop up the gap left in the evidence by the Government at the close of the case before the Hearing Officer. The improper evidence took the Hearing Officer off on the wrong track. We might have prevented this if the improper evidence had been introduced in our presence.

The statute, 8 U.S.C.A. § 1252 (b) provides that:

> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross examine witnesses presented by the Government;

The real question should have been what information was in the hands of the American Consul and what did that official determine concerning the nature of the crime?

Another real question left unanswered was what did the Inspectors at the Port of entry know concerning the previous history of petitioner?

The Hearing Officer acted in the face of an uncertainty as to whether petitioner was the same person described in the records offered to prove the former conviction. Nothing had been proved to show that the Italian court had jurisdiction of petitioner or of the subject matter.

The charge made was as follows: (App. 84)

> 6. You were convicted in the Ordinary Court of Assize at Naples, Italy on May 18, 1917, for the crime of voluntary homicide;

The findings of the Hearing Officer were founded upon some papers brought from Italy by Mr. Rando (App. 154),

supplemented by some evidence introduced in our absence after the hearing closed. Exhibit No. 36 (App. 224) is dated July 23, 1954 and is sworn to March 27, 1957 by one describing herself as Officer in charge of the Archives, having charge of Penal Sentences issued by Judicial Authorities, attesting that the Exhibit No. 36 is a true copy. It recites that one Felice DeLucia was found guilty by a jury of voluntary homicide with grave provocation and carrying a gun, under extenuating circumstances. It recites that penalty was set on May 18, 1917 under Articles 364-51-55 of the Penal Code. Ex. 36 does not show the presence of the person sentenced, either at the time of sentence or at the time of the verdict. The Hearing Officer and the Courts below failed to notice the variance between

(a) Voluntary homicide and

(b) Voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.

We objected on the ground that one could not assume that (a) and (b) were alike. One would have to gain some knowledge of Italian law to understand the meaning of (b). We said (a) in this country might be a crime of moral turpitude. We have no such crime as (b), although we do have cases of killing without crime and without moral turpitude. There had been no proof of any foreign law before the Hearing Officer, but after the hearing was closed, the Hearing Officer obtained additional evidence in our absence and attached the affidavit of an interpreter to his opinion (App. 125).

Your Honors will find that the interpreter has translated five codes. He does not say that they have anything to do with Exhibit No. 36 or any other exhibit. All the interpreter did was to swear that the pages submitted by him in Italian had been translated. A

fair hearing would have required that we be given a chance to cross examine the interpreter. We would like to know how he obtained the five codes, if they contained all of the law or have they been supplemented by other codes or decisions? What is the law of Italy concerning moral turpitude as to the crimes shown in the exhibits? If our cross examination of the interpreter developed the fact that he knew nothing except that the papers had been exhibited to him by the Hearing Officer, naturally we would have asked that official to explain when and where he obtained the information. In *Kwock Jan Fat* v. *White*, 253 U.S. 454, the officials omitted some evidence upon which a decision had been made, in the case at bar the officials added some evidence. In either event "it was not a fair report and a hearing based upon it was not a fair hearing." Compare *McConney* v. *Rogers*, 287 F. 2nd 473 where the Hearing Officer used a deposition taken without previous notice.

Neither court nor administrative body can take notice of laws of a foreign country. *Smith* v. *Hays*, 10 F. 2d 145. Such laws must be pleaded and proved the same as any other question of fact. *United States* v. *District Director of Immigration*, 106 F. 2d 14. Other authorities collected in 31 C.J.S. EVIDENCE, §21, p. 537. WIGMORE EVIDENCE, 3rd Ed. §1697, p. 11, quotes from Lord Denman:

> "Proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law and this book truly states the law' then you have the authority of the witness and of the book."

In *Dallas* v. *Katagiri*, 256 F. 2d 545, a denaturalization proceeding, the Government neglected to prove the law of Japan as a fact.

The Board of Appeals said (App. 130):

> "Exceptions have been taken to the finding of deportability. Counsel urges that the evidence is insufficient to support the order of deportation and that the special inquiry officer's conclusions are contrary to law. It is alleged that the special inquiry officer 'considered matters not introduced in evidence in the absence of proof.'"

That is all that was said about matters not in evidence. The Board did not rule expressly on our claim of error.

We quote from Judge Perry (App. 263), herein p. 844:

> "This court does not agree with petitioner's contention that the Special Inquiry Officer took evidence in the absence of petitioner and without notice when he obtained and referred to a copy of the Italian statute."

This may be somewhat ambiguous. There can be no question but what the Hearing Officer took the code in our absence. Judge Perry must have meant that the codes were not evidence. The Government in its brief, pp. 5 and 29, took this position:

> "The Italian Code was not evidence, but represented legal research of the Special Inquiry Officer in assessing the legal consequences of the established facts. • • • The special inquiry officer's examination of the the Italian law can be described as a form of official or administrative notice."

It certainly appears from the opinion of the Hearing Officer (App. 122) that that official regarded the five codes as evidence. The Court of Appeals said, herein p. 849:

> "Respondent contends that the Hearing Officer erred in referring to the Italian Code in his decision as to moral turpitude since no proof of the foreign law was made at the hearing. We do not reach this question because, in our view, it was only necessary for the

Hearing Officer to consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion."

This puts the case before Your Honors in this posture

(1) The Hearing Officer felt the need of the five codes and based an illogical argument on them.

(2) Judge Perry said the five codes were not evidence.

(3) The Court of Appeals said that the Government does not need the five codes or any foreign law as evidence.

The trouble with (3) is that

(a) There was no proper evidence of any conviction.

(b) Prevalent standards are of no value in the understanding of the effect under the law of Italy of the various crimes mentioned in the exhibits.

The Hearing Officer realized that some knowledge of the law of Italy was necessary. If the conviction had been murder or larceny or some such crime internationally known to include moral turpitude, prevalent standards might have been sufficient, but there exists no prevalent standard for

(b) voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.

There is no evidence in the record that the five codes are in fact copies of the Italian statute. They were regarded by the Hearing Officer as evidence. They were acquired by him in some undisclosed manner and made a part of the record in our absence. The Hearing Officer said (App. 122):

"The pertinent statutory provision relating to voluntary homicide is Article 364 of the Italian Penal

Code, which was in existence in Italy at the time of the offense in 1915 and the conviction in 1917."

Nowhere in the record can be found any evidence to show that this was the pertinent statute, or that it was in existence at the time of the offense or conviction. The record, including the evidence taken in our absence, does not purport to show that the five codes constituted all of the law of Italy on the subject. The Hearing Officer said: (App. 122)

> "An English translation of Article 364 is as follows: 'Whomsoever who for the purpose of killing causes the death of a person is punished by reduction in a penitentiary for eighteen to twenty-one years.' • • •
>
> The record establishes that the conviction was for an intentional or voluntary homicide since by statute a penalty is provided for persons who 'for the purpose of killing cause the death of a person.' The phrase 'for the purpose of killing' necessarily implies that there was an intent and that the act was voluntary."

The Hearing Officer has omitted the following heading (App. 127)

> HOMICIDE

The Hearing Officer also omitted the figures (365-367-369-376-380) (App. 127) which indicates that sections of the five codes have been omitted.

Of course Your Honors know that the Appendix attached by the Hearing Officer to his opinion did not contain all of the law of Italy on the subject. An examination of Ex. 38 (App. 229) will show

(a) A conviction may be had in the absence of a defendant.

(b) An indictment may include the concept that the killing was the result of a father's overbearing will.

(c) Under this concept, the principal was found not guilty.

(d) The statute of limitations runs while a convicted person is out of the country.

(e) There had been an amnesty by Royal Decree as to some crime.

An examination of Ex. 39 (App. 236) will show

(f) That a defendant may be found by a jury to "deliberately, with intent to kill * * * under aggravating circumstances of premeditation partial mental infirmity and extenuating circumstances."

(g) The defendant in (f) was sentenced with a reduction of sentence because of mental defect and with another reduction in view of the extenuating circumstances.

In the United States, the term Homicide includes killings without moral turpitude. In the absence of any proof on the subject we assume that the law of Italy also provides for homicides that are not murder or manslaughter. The reasoning of the Hearing Officer seems to go like this

(a) I find a definition of a crime in the statute

(b) I believe that the definition is intended to cover crimes in which there had been moral turpitude

(c) I assume that the conviction shown in Exhibit 36 was for the crime I find in the definition."

When a lawyer deals with foreign law, he is well advised to approach that subject with a high degree of intellectual humility. Weiner (1950) EFFECTIVE APPELLATE ADVOCACY, p. 146, in reference to *United States* v. *Rodick*, 117 F. 2d 588; Cf. *Diaz* v. *Gonzalez*, 261 U.S. 102, 105, per Holmes J.

We quote from *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 933:

> "We are not unmindful of the myriad decisions sponsoring various concepts of moral turpitude. They offer no well settled criteria."

Here in a footnote will be found reference to some cases. Judge Barnes said further, pp. 935, 937:

> "It has been held in certain cases that the crime of which an alien was convicted twice (in order to deport him, 8 U.S.C.A. § 1251 (a) (4)) must *necessarily* involve moral turpitude to warrant deportation." (Emphasis added) In these cases it is said that:
>
> > "• • • when by its definition (the crime) does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." *United States ex rel. Robinson* v. *Day*, 1931, 2 Cir., 51 F. 2d 1022, involving forgery, and suspended sentence: *United States ex rel. Griffo* v. *McCandless*, D.C. 28 Fed. 2d 287, 288 (involving aggravated assault and battery); *United States* v. *Carrollo*, D.C. 1939, 30 F. Supp. 3, 7 (involving income tax violation § 145 (b); *United States ex rel. Giglio* v. *Neelly*, 1953, 7 Cir., 208 F. 2d 337, 340-342 (involving counterfeiting pennies).'

But, *United States ex rel. Zaffarano* v. *Corsi*, 2 Cir., 63 F. 2d 757, 759, in the Per Curiam opinion on Petition for Rehearing, explains that the judgment alone does not control; the indictment is properly considered in coming to a determination whether moral turpitude is involved where there has been a conviction of any

crime (there, assault). In discussing the general language of *United States ex rel. Robinson* v. *Day*, the Court said:

> *'This language means that neither the immigration officials nor the court reviewing their decision may go outside the record of conviction* to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean *the charge (indictment), plea, verdict, and sentence.* The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted. So construed, there is no inconsistency between that opinion and this; and such is plainly the correct construction because it *is the specific criminal charge of which the alien is found guilty and for which he is sentenced that conditions his deportation*, provided it involves moral turpitude. • • •' (Emphasis added by Judge Barnes.)

See also, *United States* v. *Carrollo*, *supra*, 30 F. Supp. at page 7, point 12, 2d ¶. • • •

> "We need not here come to the question of whether or not any conviction, whether of a crime involving moral turpitude or not, or whether of a felony or a misdemeanor, is a material fact of which the government is entitled to be advised."

The confusion which might be created if we attempt to guess at the law of Italy, guided only by the five codes, can be observed, as we have said, if Your Honors will consult Exhibit No. 38 (App. 229). After petitioner had left Italy and while residing in the United States, a proceeding was taken under which one Felice DeLucia, defaulting, was charged with premeditated voluntary homicide. We quote (App. 230):

> "Moreover it is noted that by Antonio DeLucia's acquittal, by decree rendered by this same Court June

18, 1924 based on the jury finding him not guilty, of the charge of complicity to the homicide through his having instigated his son to commit it on the person of Capasso, the essential element is lacking on whose basis the Grand Jury indicted Felice DeLucia on April 10, 1922, of premeditation in the homicide. One would be convinced of this by merely reading that indictment from which clearly emanates the concept that it was his father's overbearing will that caused Felice DeLucia to do away with Capasso, as he did later on, under the threat of not being let into the house otherwise. *For good reason therefore the Public Prosecutor asked that the circumstance of premeditation be excluded*, and the Court, affirming the responsibility of the accused, under Art. 364 of the Penal Code, is of the opinion that he be punished with the maximum penalty said article provides, in view of the gravity and circumstances of the act which exclude the application of any benefit. • • •

The Court declares Felice DeLucia son of Antonio guilty of voluntary homicide on Vincenzo Capasso *without the qualification of premeditation;* • • • Having read Art. 3 N. 2 & Art. 7 of Royal Decree 1641 of Dec. 22, 1922 Art. 86 of the Pen. Code & 421 of Crim. Procedure Code absolves said Felice DeLucia of the offense of failing to declare arms under the Amnesty granted by said Decree. • • •

By Decree issued Apr. 18, 1940, Penal action in connection with this conviction has, under the statute of limitations, been declared extinct and order of arrest of June 30, 1924, has been revoked. Naples, April 19, 1940" (Italics supplied.)

It will be noted that reference is made to an indictment, which may show lack of moral turpitude. This indictment was suppressed by the Government, as were the indictments in the other two cases, i.e., Ex. 36, Ex. 37 (App. 224, 227). If as the Court of Appeals has said, the Hearing Officer could judge by prevalent standards, that Officer should have been furnished the indictment.

Such implication as was made by the Hearing Officer from the five codes would not be necessarily true in this country, as a person may intentionally kill without guilt. Again we say implications were drawn from a portion of the supposed code. No explanation appears in the record as to the law applicable to the conviction as shown in Exhibit No. 36. As was said by the Chief Justice in *Jordan v. DeGeorge*, 341 U.S. 223, 226:

> "Therefore, our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. Whether or not certain other offenses involve moral turpitude is irrelevant and beside the point."

The Hearing Officer undertook to cite the United States authorities to show that the crime of manslaughter has at times in this country been held to include moral turpitude. This comparison leaves out the fact that it was not shown that petitioner was convicted of manslaughter as that term is understood in this country. Without the full record and the law of Italy no one can tell of what anyone was convicted.

Ex. 37 (App. 227) shows:

> "Title of Crime—Attempted Homicide."

This should have warned the Hearing Officer that the word "Homicide" may not mean manslaughter. In this country there is no such crime as assault with intent to commit manslaughter. *People v. Moore*, 146 Ill. 600. The term "Attempted Homicide" would be meaningless, without more as to the law and the indictment.

Your Honors know that in the United States our laws provide for killing without criminal intent, i.e., as in self defense, or in defense of habitation, or as in killing by misadventure. In the absence of proper proof as to just

what the law of Italy might have been and in the absence of proper proof as to the nature of the crime, the Hearing Officer was left to speculate that a crime involving moral turpitude had been involved. Your Honors know that in this country a crime might originally be a serious one as to the charge and reduced in turpitude by a court after the evidence has been heard. See footnote No. 14 to *Ablett* v. *Brownell*, 240 F. 2d 625, 631 for Section 4 of the Act of September 3, 1954, 68 Stat. 1145-1146, 8 U.S.C.A. §1182 (a), concerning crimes in which the punishment was reduced. In an appendix, herein p. 861, we have copied from a text book in re crime involving moral turpitude, conviction *in absentia* and juvenile delinquency.

See also *Calvillo* v. *Robinson*, 271 F. 2d 249, 250. See footnote 341 U.S. 236 for opinion of Attorney General on moral turpitude. The record made before the Hearing Officer left all such matters as to the law and practice of Italy to speculation.

Reference is made in Ex. 38 (App. 231) to the acquittal of one defendant in a previous trial. Without the indictment in evidence as to any of these cases, the Hearing Officer was left to speculate on the legal effect in Italy of this acquittal.

One may kill intentionally under the law in this country without moral turpitude. We do not know about the law of Italy because the Government failed to prove that law, or to make any attempt, in our presence.

The Court of Appeals said, herein p. 849:

> "It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term 'voluntary' indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable."

In *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 934, Judge Barnes said, quoting from *Twentieth Century Fox Film Corp.* v. *Lardner*, 216 F. 2d 844:

> "With respect to crimes and moral turpitude there are three possible classifications:
>
> "1. Those crimes necessarily involving moral turpitude for example, frauds;
>
> 2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;
>
> 3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, willful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee. See *In re Hallinan*, 43 Cal. 2d 243, 272 P. 2d 768."

The fact that the sentence was for 2 years, 6 months and 16 days and a pecuniary penalty of 145 lire (App. 225) should have put the Hearing Officer on notice that probably the Italian Officials were dealing with a crime which did not include moral turpitude. From Ex. 39 (App. 234, 237, 238) we observe that a defendant found to have "a partial mental defect" and another declared to be "partially unbalanced mentally at the time" were given reduced sentences because of this condition. This should have warned the Hearing Officer to not rely on inferences to be drawn from records showing a practice different from ours. Here a sentence was imposed on one defendant in his absence, but that sentence was void under our standards. If one negates the possibility of a killing being justifiable that does not negate a killing being without moral turpitude, as for instance a killing in the commission of another.

In *United States* v. *Uhl*, 107 F. 2d 339, it was held that where alien is convicted of crime which does not necessari-

ly involve moral turpitude, deporting officials cannot consider the particular conduct for which the alien has been convicted. Immigration Act of 1917, §19, U.S.C.A. §155. Judge Hand said,

> "It will be observed that the indictment was satisfied by an intent to commit any crime whatever, no matter how morally innocent it might be. Hence, in accordance with the doctrine, which we have several times announced, unless the possession of the jimmy with intent to use it for any crime at all, was 'necessarily,' or 'inherently', immoral, the conviction did not answer the demands of §19 of the act of 1917. *United States ex rel. Mulius* v. *Uhl*, 2 Cir., 210 F. 860; *United States ex rel. Robinson* v. *Day*, 2 Cir., 51 F. 2d 1022; *United States ex rel. Zaffarano* v. *Corsi*, 2 Cir., 63 F. 2d 757."

We repeat from the above quote from the Court of Appeals, herein, p. 849:

> "• • • the fact that a sentence was imposed negates any possibility that the killing was justifiable."

The killing could be not justifiable, yet it could lack moral turpitude. The entry of a sentence in Italy does not have the same legal significance as would a sentence in the United States. An inspection of Ex. 36, 37, 38 and 39 will show many sentences unknown to our law. As we have mentioned, in Ex. 39 (App. 236) it appears that killing by a mental defective was said to have been deliberate with intent to kill. The use of words "*voluntary homicide with grave provocation and carrying a gun, under extenuating circumstances*" should not have been construed to mean the same as voluntary manslaughter as understood in the United States.

Judge Perry said (App. 263), herein p. 843:

> "The fact of petitioner's convictions having been established, it was not within the province of the Spe-

cial Inquiry Officer to inquire into the circumstances surrounding the homicides. It was his duty to determine only whether or not the crimes for which petitioner had been convicted involved moral turpitude, and this he did."

We contend that Judge Perry was in error in assuming that

> "The fact of petitioner's conviction having been established."

As was said in *Browne* v. *Zurbrick*, 45 F. 2d 931, 933, if reference is to be had to the conviction the reference can not stop half way, the full facts show, etc. In *Vidal Planas* v. *London*, 104 F. Supp. 384, 389, Judge Westover looked into the circumstances of a conviction of homicide in Spain and held that it did not involve moral turpitude, because of extenuating circumstances. The cited case of *Mongiori* v. *Karnuth*, 30 F. 2d 825, involves manslaughter in the second degree.

Now if Your Honors will again inspect the five codes appended by the Hearing Officer (App. 125), Your Honors will find nothing about premeditated voluntary homicide, or the right of the Italian Court or the Prosecutor to waive a portion of the charge. With the sort of reasoning employed by the Hearing Officer, it could easily be established that one killing in self defense in Illinois is guilty of murder, merely because our statute on Homicide includes a definition of murder. The phrase "for the purpose of killing" is not found in Exhibit No. 36. The fact that it is found in the five codes means nothing, in the absence of further evidence. We repeat from the opinion of the Hearing Officer (App. 122):

> "The phrase 'for the purpose of killing' necessarily implies that there was an intent and that the act was voluntary."

So we present this confusing picture. Judge LaBuy and the Hearing Officer inquired into the circumstances in order to identify petitioner as the person named in the various documents. Then after the Hearing Officer makes his inquiry, consults the documents and holds that the papers from their content show a crime of moral turpitude, we seek to point to further circumstances to show lack of premeditation, extenuating circumstances and absence of moral turpitude then we are told by Judge Perry that the Hearing Officer should not have looked at the contents of the various exhibits. We are told by the Court of Appeals that it was not necessary for the Hearing Officer to look. The Hearing Officer looked until he found support for his adverse conclusions. Then when we look at the same material in order to point to thy lack of evidence from which to find the fact of conviction of petitioner of a crime involving moral turpitude, we are denied the right to look at the circumstances on which the Administrative officials founded the order of deportation.

How can any one say that from the fact that a sentence was imposed that that, under Italian law, negates that the killing was justifiable? We know from this record Ex. 38 (App. 231) that a sentence was imposed on one Felice DeLucia in 1924. Petitioner was in the United States in 1924. Obviously a sentence under Italian law does not have the same meaning as a sentence here in the United States.

The Hearing Officer failed to notice the difference between voluntary homicide and the record made of the conviction. In *United States* v. *Saccarello*, 200 F. 2nd 540, was held that "moral turpitude" could be determined with out reference to foreign laws. The Immigration Officials and reviewing courts need look only to the record and the inherent nature of the offense. The alien was convicted of forgery and larceny. In *Marcus* v. *Lenoir*, 96 F. 2d 122,

the crime of conspiracy to defraud was involved. In *United States* v. *Corsi*, 63 F. 2nd 757, the indictment was not in the record. The alien admitted and a clerk's certificate showed conviction of assult in the second degree. This crime did not necessarily include "moral turpitude." In *United States* v. *District Director*, 106 F. 2nd 14, Judge Clark said, p. 21:

> "Had the facts pointed to the crime of forgery under American law, the burden of explanation that the German law was otherwise might well be required of the alien, but it does not seem to us that under the circumstances, facts showing an intent to defraud or deceive should be supplied by a mere rule of procedure."

Petitioner asserts that if the Government had proved voluntary homicide as charged in the deportation rule and the law of Italy designated voluntary homicide as a crime including moral turpitude, that would be one thing, but when the record of conviction shows something different than voluntary homicide, as we know it, the very terms of the conviction demonstrate lack of moral turpitude.

It must be kept in mind that the Government under the law, had the burden of proving that petitioner was convicted of a crime involving moral turpitude.

In *Forbes* v. *Brownell*, 149 F. Supp. 848, the Court construed a Canadian statute defining the offense of bigamy. The Court found p. 852:

> "It follows, therefore, that the Exclusion Order entered by the defendant against the plaintiff is grounded on a misapprehension of the inherent nature of the crime of bigamy in Canada and cannot be sustained."

In the case before Your Honors, the Hearing Officer confessed that he had not understood the significance of Exhibit 36 and required resort to the five codes.

If this appeal for help had been accomplished in our presence, the situation may have been quite different. Your Honors are now left to speculate as to what cross examination may have brought forth.

The phrase "crime involving moral turpitude" lacks sufficiently definite standards to justify this deportation proceeding, hence the statute is unconstitutional for vagueness. The alien in *Jordan* v. *DeGeorge*, 341 U.S. 223 raised this objection having been twice convicted in this country for conspiracy to defraud. A divided Court overruled the objection holding that crimes in which fraud is an ingredient have always been regarded as involving moral turpitude. The case at bar does not involve a claim of conviction for fraud. Your Honors are referred to the dissent by Mr. Justice Jackson, p. 232, concurred in by Mr. Justice Black and Mr. Justice Frankfurter. Here will be found an argument adopted by petitioner. In the dissenting opinion Mr. Justice Jackson said, p. 242:

> "A different question might be before us had Congress indicated that the determination by the Board of Immigration Appeals that a crime involves 'moral turpitude' should be given the weight usually attributed to administrative determinations. But that is not the case nor have the courts so construed the statute."

In *Tseung Chu* v. *Cornell*, 247 F. 2d 937, 939 Judge Barnes said:

> "While it is true that Mr. Justice Jackson, who was joined by Mr. Justice Frankfurter, wrote a strong dissent, we feel bound by the language and reasoning of the majority of the Supreme Court."

In considering whether violation of 26 U.S.C.A. §145 (b) involved moral turpitude, Judge Barnes had before him the indictment, the plea and sentence and dealt with a

crime committed in the United States. In contrast the case at bar presents a fragmentary record together with much speculation about the foreign law applicable. We note that a Departmental finding that crimes which alien was convicted involved moral turpitude is not binding in a court. *United States* v. *Tuttle*, 46 F. 2d 342.

At the hearing, as is shown by the record, there had been no indication that the Hearing Officer intended to look up further evidence in our absence. The first knowledge petitioner or his attorney received concerning the use of this illegal evidence was after the deportation order had been entered and the opinion of the Hearing Officer had been received by mail (App. 56). The statute, Title 8 U.S.C.A. §1252 (b), provides for presence. Due process of law is not given when evidence is obtained and used in the absence of a party. We quote two of the sections of the above statute:

> (3) The alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

Deportation is a penalty and care must be exercised that procedure employed against aliens meet the essential standards of fairness. *Bridges* v. *Wixon*, 326 U.S. 135:

> "Where right of an alien to remain in the United States is challenged the alien before being deported has right to a 'fair hearing', including the right to be apprised of nature of charge against him and reason for the challenge of his right to remain in the United States, and the right to be confronted with witnesses and to present testimony and have counsel."

Your Honors will note from *Bridges* v. *Wixon*, 326 U.S. 135, 150 that the regulations of the Immigration and Naturalization Service provide that a recorded statement made by any person may be received in evidence:

> "only if the maker of such statement is unavailable or refuses to testify at the warrant hearing."

There was no showing that the author of the statement here was unavailable or refused to testify. Your Honors said, p. 154:

> "Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Your Honors held that a hearsay statement had been introduced into evidence in violation of the rules and, p. 152, that the rules were designed to protect the alien and to afford him due process of law. In *United States* v. *Dunton*, 291 F. 905, it was held that documentary evidence not received until after the last hearing could not be considered. *United States* v. *District Director*, 106 F. 2nd 14, 19.

So far in this argument we have followed the Hearing Officer on the wrong track taken by him. The Hearing Officer, with the help of the five codes, undertook to construe the alleged record of conviction. The real question should have been—what information was in the hands of the American Consul and what did that official determine concerning the nature of the crime, if any, committed?

From the failure of the Government to produce the visa and the papers on which the visa was founded, or to account for their absence, Your Honors must conclude that the American Consul was advised of any difficulty petitioner had with the Italian authorities, and the American Consul concluded that the conviction was not for a crime of moral turpitude.

Another real question overlooked is—what information was in the hands of Mr. Beck when he approved of the passport and visa and admitted petitioner?

Also Your Honors must give heed to the judgment of the Naturalization Court finding that petitioner was in fact an alien of good character, who had entered legally and had resided here for the required period. The Hearing Officer paid no attention to the action of the American Consul, the decision of Mr. Beck or the judgment entered by Judge Wilkerson.

In review of the findings, Your Honors will consider the failure on the part of the Government to prove the identity of petitioner in relation to certain alleged documents introduced by the witness Rando. The following is copied from the transcript (App. 98):

> "Mr. Stewart: Now, with reference to the testimony concerning certain documents, gathered by a witness by the name of Rando, I don't dispute that Mr. Rando would testify the same here as he did before Judge LaBuy, so that stipulation stands.
>
> But after Mr. Rando would testify, if he testified here the same as he did in the transcript, there would still remain a gap in the evidence because there is no evidence that Paul DeLucia, who is here at the table, is the same person that is named in the various documents that he (Mr. Rando) produced. That objection is open on the record and I, just as a matter of caution and precaution, don't want it understood that I am agreeing that those exhibits actually refer to Paul DeLucia; and the exhibits, themselves, we can argue from them as to their value after they are in, because it is understood that I am not admitting their materiality."

Your Honors will notice from an examination of the decree that Judge LaBuy did not find as a fact that Mr. Rando or anyone else had identified petitioner.

We quote from Judge Murphy in *People* v. *Casey*, 399 Ill. 374, 378:

> "It would be contrary to the law of what is right and just in a criminal action to hold that the enhanced penalty could be inflicted in the face of an uncertainty as to whether defendant was the same person as the one described in the records offered to prove the former conviction."

In the case at bar, the papers were put in evidence before Judge LaBuy and again before the Hearing Officer, for the purpose of establishing a link in the chain to prove that petitioner was the same person shown in those foreign judgments. The link created by the papers if any, has no value unless Your Honors look to the foreign documents for the family history of the person convicted.

Even if it were proper to look at the contents of the foreign records we would find contradictions. Ex. 36 (App. 224) purports to show a conviction on May 18, 1917, for a crime committed on Emilo Perrillo on July 17, 1915. Ex. 37 (App. 227) purports to show that Felice DeLucia entered prison July 17, 1915, "Title of Crime: Attempted Homicide and serious wounds against Ferrillo Emilo." If the person shown to have been convicted in Ex. 36 (App. 224) ever entered prison on that charge, Mr. Rando has not produced the record or accounted for its absence. Ex. 39 (App. 241) orders the release of Emilia and Antonia DeLucia "having served their respective terms while in prison waiting for trial." Ex. 36 (App. 224) describes Felice DeLucia as 17 in 1917. The Italian Code produced by the Hearing Officer provides (App. 126):

> "If, at the time of sentence the convicted has not as yet completed the age of eighteen, the judge may order that the penalty restricting personal liberty may be served in a correction house: and interdiction from public offices and imposition of special surveillance by the Authority of Public Safety are not applied."

We quote from §637, 32 C. J. S. p. 489:

> "The record is not, however evidence of any matter which can only be inferred from it by argument, and the record may not be introduced to establish the facts on which a judgment was based."

The Hearing Officer used the foreign judgments as evidence of family history and other alleged facts, having no place in a judgment and being hearsay. The law does not permit the building of presumption on presumption. *Smith v. Fidelity & Casualty Co.*, 261 F. 2d 460. As was held in *C. M. St. P. Ry. v. Coogan*, 271 U.S. 472, 477:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstance must be proved, and not themselves presumed."

The Hearing Officer was compelled to look to circumstances in evidence for other presumptions on top of this presumption.

The findings of the Hearing Officer might be summarized as follows:

(a) The Government relies upon a paper purporting to show conviction of one Felice DeLucia.

(b) There is no proof of the identity of the Felice DeLucia as being petitioner.

(c) However, I have compared the disputed paper with other papers, also purporting to refer to one Felice DeLucia.

(d) There is no proof of the identity of the Felice DeLucia named in these other papers as being petitioner.

(e) But, because of the similarity of names and a portion of the family history to be found in the disputed papers, with the name and a portion of the family

history of petitioner, I find that the paper shows a conviction of crime as to petitioner.

(f) In making this comparison I have taken into consideration the name and such other circumstances of description, to be found in the disputed paper, purporting to show a conviction.

Nothing had been proved before Judge LaBuy or before the Hearing Officer to show that the Italian court had jurisdiction of the person of petitioner or the subject matter. Ex. 38 (App. 229) shows on its face that a defendant was convicted in 1924, after the arrival of petitioner in the United States. On the face of Ex. 36 (App. 224) there is nothing to show the presence of the person there said to have been convicted. The Hearing Officer had nothing before him but that previously presented to Judge LaBuy.

On Exhibit 36 Mrs. Iole Mazzolini, certifies that she is officer in charge of the Archives of State in Naples, Italy, having legal custody of the Penal Sentences issued by the Judicial authorities of Naples (App. 225). We have no such office in this country. We might guess and compare this Italian officer to our Keeper of a Warehouse. In the absence of proof of the law of Italy this certification means nothing. *United States* v. *Grabina*, 119 F. 2d 863.

We know that a copy of a sentence in this country would be worthless without more, even if properly certified by the person charged with making and keeping the record. Your Honors must know that in our Criminal Court the State is required to prove the jurisdiction of the Court in proof of a previous record. Also outside of this record, the prosecution is required to introduce a police officer or some other witness, to identify the person on trial as being the one named in the previous record.

Ex. 37 (App. 227), purports to be a prison record. One Felicia De Lucia, age 17, arrested on July 17, 1915 and entered prison on the same day. No law was produced to show that such record is required, or where the information was obtained. It is fair to assume that any prison record would also show the date of discharge of the prisoner. This portion was suppressed by the Government. If this prisoner was in fact petitioner he may have left prison and have gone to France before the date of the conviction on May 18, 1917 in Ex. 36 (App. 224). No prison record or any other evidence was produced to show that the person convicted in Ex. 36 ever entered any prison. This gives rise to the view that if all of the records had been produced they would show that the defendant named in Ex. 36 was not in Naples on May 18, 1917, the day of sentence.

Exhibits 36 and 37 are but hearsay. We quote from 31 C. J. S. §194, p. 930:

> "A statement otherwise objectionable as hearsay does not become competent because it had been reduced to writing. A written statement is equally inadmissible under the rule excluding hearsay evidence where its form is judicial * * * In addition, a written statement is inadmissible as hearsay where the form is official * * * "

In *Esnault-Pelterie* v. *Chance Vought Corporation*, 56 F. 2d 393, affirmed 66 F. 2d 474, the trial judge rejected a foreign record holding that it was a fair assumption that a translator is not the custodian of court records. In the case at bar, the title Keeper of Archives, as we have said, suggests an official who might have charge of a storage place. There is no showing that she had any connection with the courts. The fact that Jole Mazzoleni has signed Exhibit 37 (App. 227) as having charge of the registry

of prisoners of the jail causes one to conclude that these Exhibits were copied from some central store house.

Where a judgment is relied upon as an adjudication on the subject matter or as establishing any particular state of facts of which it is the judicial result, it can be proved only by offering in evidence a complete record or a duly authenticated copy of the entire proceedings in which the judgment was rendered. (32 C.J.S. §646 p. 511). A public record is not evidence of matters incidently noted therein. (32 C.J.S. §644, p. 509). The record is not however evidence of any matter which can be inferred from it by argument and the record may not be introduced to establish the facts on which a judgment is based (32 C.J.S. §636, p. 489). The judgment will not be recognized where it was arrived at in a mode or manner repugnant to natural justice or where it appears that the defendant was beyond the territorial jurisdiction of the Court. (50 C.J.S. §906, pp. 544, 545). A foreign judgment in a criminal case is not *res judicata* or proof of the facts adjudicated in a subsequent civil action based upon the same facts. (50 C.J.S. §906, p. 546).

In the case at bar, there was no proof that the court was one of general jurisdiction. Where it does not affirmatively appear of record that the judgment was rendered by a court of general jurisdiction, the burden of proving that the foreign court had the requisite jurisdiction is on one relying upon the judgment. (C.J.S. §906, p. 545). There was no direct evidence that the defendant in the case at bar was also the defendant in the foreign judgments. The Hearing Officer should have mistrusted the evidence introduced by the Government as soon as it could be observed that the Government had suppressed evidence. Mr. Rando never claimed that he had produced for inspection all of the records obtained by him. When we notice from Ex.

37 (App. 227) that one Felice DeLucia, age 17, entered prison on July 17, 1915 for the crime of Attempted Homicide and serious wounds against Ferrillo Emilo and that Ex. 36 (App. 224) shows a conviction of May 18, 1917, we are left to guess that Ex. 37 and Ex. 36 refer to two different cases. Where is the record of Felice DeLucia entering prison on or after May 18, 1917? Was the sentence suspended or did the defendant enter some reformatory? Or had petitioner left Italy for France before May 18, 1917? The Hearing Officer should have concluded that there was no evidence on the subject because the absent evidence would have contradicted the theory of the Government.

When Judge LaBuy decided that petitioner had not truthfully answered a question about an arrest, all Judge LaBuy was required to look for in the various exhibits was evidence that petitioner had in fact been arrested in Italy. It was not necessary for Judge LaBuy to find that petitioner had been convicted. On the other hand, it was necessary for the Hearing Officer to find that petitioner had been convicted. The evidence heretofore considered by Judge LaBuy was deficient to prove conviction. The Hearing Officer endeavored to patch up this deficiency by resort to evidence taken in our absence and failed to fill the gaps in proof.

Motion Pursuant to Rule 60(b).

At the Administrative hearing (App. 86), petitioner admitted that he was not a citizen, with a reservation to the effect that petitioner intended to move to vacate the LaBuy decree. In view of the fact that that decree has been affirmed, herein p. 813, it was necessary to apply to the Court of Appeals for leave, herein p. 865. Leave has

been denied, herein p. 871. In affirming Judge LaBuy, herein p. 818, 819, Judge Schnackenberg said:

> "While the court did not expressly indicate what it meant by the words *'the concealment of other material facts'*, it is apparent to us from the context of the memorandum that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum. . . .
>
> "More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization *was illegally and fraudulently procured*, the latter was not res judicata of issues presented in the denaturalization proceeding." (Italics supplied).

We respectfully contend that the Court of Appeals, instead of interjecting words not used by Judge LaBuy, should have sent the case back for findings Judge LaBuy might have made. In *Johnson* v. *United States*, 256 F. 2nd. 849, after noting the insufficiency of the findings made by the District Court, the Court of Appeals, instead of remanding for fact findings, awarded a new trial. Now that the opinion of the Court of Appeals has become a closed book, petitioner seeks relief by virtue of Rule 60(b). The doctrine of collateral estoppel is inapplicable in litigation where decisions of this Honorable Court intervene between the earlier and later litigation to change the applicable principles. *Commissioner* v. *Sunnen*, 333 U.S. 591.

As was said by Mr. Justice Brennan, dissenting in *Polites* v. *United States*, 364 U.S. 426, 439:

> "The United States in this case seeks to distinguish that decision by asserting that there 'the continuing force of the decree derives from facts fully accrued and litigated in the original judgment' True enough; but here, as in *McGrath* (339 U.S. 33) although the

facts were fully accrued at the time of the decree and have not changed, the law has (so petitioner asserts) radically changed, and in that situation it is unjust to give the judgment prospective effect."

The change in the law, or clarification, as to the case at bar is to be found in a number of cases, including *James* v. *United States*, 366 U.S. 223. If Judge LaBuy or the Court of Appeals had had the benefit of the *James* case, it might have been decided that petitioner should have been judged by the law as it stood in 1928, when petitioner made answer to the following questions (App. 211)

> 24. Have you ever been arrested? No. Have you ever been charged with a violation of the prohibition law or any other law of the United States, or State, or any city ordinance? No. If so, give particulars.

The above questions were preceded by the following (App. 211)

> 22. If necessary, are you willing to take up arms in defense of this country? Yes.
>
> 23. Did you file a questionnaire with a draft board during the war? If so, answer the following: Date filled in ..... Address at that time ..... Address of draft board ..... Board division No. ..... Your order No. ..... Your serial No. ..... Class in which you were placed ..... Division ..... Date of Classification ..... Did you claim exemption because you were an alien? ..... For any other reason? ..... Why? .....

Cf. *Nowak* v. *United States*, 356 U.S. 660, *Maisenberg* v. *United States*, 356 U.S. 670. In *United States* v. *Tuteur*, 215 F. 2nd 415, 417 Judge Schnackenberg said:

> "In a naturalization proceeding the court, before it can enter an order for naturalization, must find as a matter of fact first, that certain indispensable legal

requirements for naturalization have been fulfilled and, secondly, if such requirements have been fulfilled, whether the applicant for citizenship should be granted naturalization in view of his beliefs, background, etc. As to the requirements in the first class, if compliance therewith does not exist, an order of naturalization is subject to revocation on the ground of illegal procurement regardless of whether it was based upon false statements given by the applicant intentionally or unintentionally. As to the court's exercise of its discretion, in the second class, in order to set aside an order of naturalization on the ground of fraud because of false testimony given by the applicant to influence the court in its action, it is necessary for the government to prove that the said testimony of the applicant was intentionally false. In other words, the government in the latter situation must allege and prove fraud, in which an essential element is intent.

(4). In the petition in this case the allegations in reference to false statements alleged to have been made by respondent fall in the second class. To be actionable they must be connected directly with allegations of intent on his part to deceive."

The denaturalization case against Tuteur was brought before Congress shifted ground, as the shift was pointed out in *United States* v. *Stromberg*, 227 F. 2nd 903, 905. So illegal procurement is no longer a ground for denaturalization. Judge Schnackenberg interjected fraud into petitioner's case, which interjection has no basis in the record. Petitioner seeks the right to return to the District Court for a decision as to whether fraud has been proved, in the light of the *James* case. It is contended that there is not enough evidence to prove an intent to deceive on a material matter. Leaving aside the probable understanding that petitioner believed the question was directed to possible arrests in this country, petitioner had a right to assume that after he had passed inspection and five years

had elapsed, he had acquired lawful residence and it did not matter to the United States officials what may have happened in Italy. We quote from the testimony of Mr. Durisch (App. 141, 145):

> "Then the examiner proceeded to take the assertions in the application and using the same language he could question the applicant as to the various items of fact alleged all the way through and as to the assertions that were needed for petition. It was customary to check opposite those assertions * * *
>
> "The top date, August 10th, 1920, on his brief, and under the formalized style, would indicate the date the naturalization petitioner arrived in the United States and indicates continuous residence from the date of arrival up to the date of examination."

We contend that the entire testimony of Jordan and Durisch supports a conclusion that no one considered any trouble in Italy as material "to the assertions that were needed for petition."

Your Honors will find that the case of *United States* v. *Profaci*, 274 F. 2nd 289, contains much to be applied in the case at bar. We quote, p. 292:

> "Even if it were sufficiently proved that Profaci was specifically asked 'Were you ever arrested?' the Government's proof does not convincingly demonstrate that the defendant actually understood the question to refer to arrests outside the United States, and especially to those preceding his hearing by more than five years. Such proof, we hold, was essential, cf. *United States* v. *Rossi*, 2 Cir., 182 F. 2d 292, since illegal procurement as a ground for revocation of citizenship had been eliminated by the 1952 Act. *United States* v. *Stromberg*, 5 Cir., 227 F. 2d 903. * * * It seems plain to us that the arrest question allegedly put to Profaci contained greater ambiguity than that present in the question which the Supreme Court dis-

cussed in *Nowak v. United States, supra* (356 U.S. 660; 78 S.Ct. 957) * * * We hold that the Government has with the requisite degree of certainty, neither convincingly established the content of the question put to Profaci nor, accepting the Government's position on this issue, filled the gap in its proof as to the defendant's understanding and knowing falsification of the question asked. *Nowak v. United States, supra; United States v. Meli, supra;* (158 F. Supp. 21, affirmed 265 F. 2nd 222.)"

In considering our application under Rule 60(b), please keep in mind that *Nowak* v. *United States*, 356 U.S. 660 and *James* v. *United States*, 366 U.S. 223, were decided after the LaBuy decree was rendered. As was said in our suggestions made to the Court of Appeals, herein p. 866:

> 3. If the said decree were set aside, DeLucia would cease to be subject to the jurisdiction of the Administrative body and therefore the deportation order would be void.
>
> 4. A petition filed pursuant to Rule 60(b) might restore jurisdiction in the District Court in order that findings of fact and conclusions of law might be made defining the jurisdiction of the District Court. The subsequent deportation proceedings have made it necessary to have a clearer statement of what was intended by the decree entered by Judge LaBuy.

In *McKay* v. *McAlexander*, 268 F. 2d 35, 39, Judge Hamley said that evidence showing an inaccuracy in declaration of residence in Naturalization proceedings is insufficient to impeach a decree, citing, *In re McCoppin*, Fed. Cas. No. 8, 713, 5 Sawy 630; Van Dyne, Citizenship of the United States (1904) p. 108.

The difference between the presence and absence of fraud may very well spell the difference between a can-

cellation as of 1957 and a cancellation dated back to 1928. It must be remembered that Judge Schnackenberg has held, herein p. 851, that Judge LaBuy nullified the naturalization proceedings. A finding of fraud was no doubt thought to be a necessary foundation for this decision. Judge LaBuy did not find fraud. Petitioner seeks an opportunity to have Judge LaBuy to say that no fraud was proven and that the District Judge did not undertake to nullify all that took place before Judge Wilkerson.

Costello v. *United States*, 365 U.S. 265 can be distinguished on the ground that Costello was answering as to the five years period of probation, but it may be noted that Mr. Justice Douglas said, dissenting, p. 289:

> "Petitioner answered truthfully when he listed 'real estate' as his 'occupation.' He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government. We could not do so and be true to the strict standard exacted from the Government by *Schneiderman* v. *United States*, 320 U.S. 118, 122-123."

In the case at bar, petitioner answered truthfully when he answered No. But he may not have answered truthfully if the answer is to be taken to embrace that which everyone may have considered immaterial.

As was said by Judge Goodman in *Benvenuto* v. *Barber*, 157 F. Supp. 575, 578:

> "A wrong answer, if given, is not automatically synonymous with a fraudulent answer."

As was said in *Johannessen* v. *United States*, 225 U.S. 227, 242:

> "The act makes nothing fraudulent or unlawful that was honest and lawful when it was done."

As is shown by the record, petitioner is married and has become the father of three children born here. For him, deportation is banishment. Doubts in statutory construction are to be resolved in his favor. *Fong Haw Tan* v. *Phelan*, 333 U.S. 10. Before petitioner is torn away from his wife and children and deprived of all that makes life worth living, we trust that Your Honors will agree that the mandate for his banishment should be clear and unequivocal. We respectfully request careful consideration of the many errors assigned and urge that the decision below be reversed. As to Rule 60 (b), we request application of the power of this Honorable Court to supervise and to see that justice is done.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the Seventh Circuit, that the judgment in the deportation case be reversed. Also that a writ be issued in the matter of petitioner's motion for leave to file his petition pursuant to Rule 60(b) Federal Rules of Civil Procedure and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

PAUL DELUCIA

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